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Nos. 79-1404, 79-1408,
79-1414, 79-1415 and 79-1489

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

PENNHURST STATE SCHOOL AND HOSPITAL, *et al.*,
Petitioners

v.

TERRI LEE HALDERMAN, *et al.*,
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS,
et al.,
and
UNITED STATES OF AMERICA,
Respondents

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS TERRI LEE HALDERMAN, *et al.*,

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QUESTIONS PRESENTED

1. Was certiorari improvidently granted in view of recent proposed regulatory changes, enactment of the Civil Rights of Institutionalized Persons Act, P.L. 96 - 247, intervening decisions of the Court, the dispositive nature of state law, and the factual nature of the case?

2. Did the District Court and the Court of Appeals *en banc* reasonably and correctly interpret dispositive and definitive Pennsylvania statutory and case law providing an enforceable right to habilitation to the retarded?

3. In the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000 *et seq.*, did Congress grant retarded people an enforceable right to habilitation appropriate to the individual, with a remedy provided under either 42 U.S.C. 1983 or, alternatively, an implied private right of action?

4. Where undisputed and uncontradicted facts prove the abominable conditions in an institution for the retarded and prove that every person confined in the institution can and should be cared for in a continuum of less costly, more effective structured community settings, does a District Court have the equitable discretion, under the Developmentally Disabled Assistance and Bill of Rights Act, to prohibit further admissions and to require that the institution be replaced?

5. Where government officials adamantly refuse to remedy violations of rights and where protection of state and federal statutory rights would otherwise be impossible, does appointment of a master with circumscribed supervisory duties and the granting of relief tailored to the circumstances violate principles of federalism?

LIST OF PARTIES

The parties are adequately listed at pages ii through iv of Brief for Petitioners except that it is not there indicated that the private respondents sue on behalf of all persons similarly situated.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. Certiorari should be dismissed as improvidently granted because of changes and proposed changes in the law, recent decisions of this Court, the dispositive nature of the state law ground, and the factual nature of the case.	20
A. Developmental disabilities program — proposed regulations	20
B. Enactment of the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349	21
C. Recent decisions of this Court resolve several important issues in this case	22
D. State law fully supports all aspects of the judgment below	23
E. The dispositive facts are undisputed and the issues are factual in nature	23
II. The District Court and the Court of Appeals *en banc* reasonably and correctly interpreted dispositive Pennsylvania statutory and case law providing an enforceable right to habilitation provided in an individually determined least restrictive setting, thereby rendering unnecessary any further decision by the Court	24

TABLE OF CONTENTS — *(Continued)*

Page

A. Where the lower courts reasonably interpreted state law, any further decision by this Court is unnecessary 24

B. The lower court decisions are based on independent dispositive determinations of a state law right to habilitation, individually determined and provided in an appropriate least restrictive setting 26

C. State law requires affirmance of the judgment below 30

III. In the Developmentally Disabled Assistance and Bill of Rights Act, Congress established rights, including the right to individually determined habilitation in the appropriate least restrictive setting 34

A. The plain meaning of the Act supports the judgment below 35

B. The statutory predecessors of the current statute 37

C. Procedural history of the Bill of Rights . 39

D. Congressional intent to create enforceable rights is manifest in the legislative history of the Bill of Rights 40

IV. A judicial remedy is provided to developmentally disabled people for official deprivation of rights under the Developmentally Disabled Assistance and Bill of Rights Act 49

A. Remedy under 42 U.S.C. §1983 49

B. Private right of action 53

TABLE OF CONTENTS — *(Continued)*

Page

V. Where petitioner government officials adamantly refuse to remedy their violations of respondents' rights and where protection of state and federal statutory rights would otherwise be impossible, individual determinations of need and appointment of a special master with circumscribed supervisory duties does not violate principles of federalism and is not an abuse of discretion 57

A. Equitable discretion permits choice among acceptable alternative structures for relief 58

B. The relief granted is fully within appropriate discretionary limits 60

1. Individual determinations 61

2. Appointment of a master 63

3. Implications for other states of nature of relief in Pennsylvania 66

CONCLUSION 68

TABLE — All states' statutory provisions regarding rights to habilitation and treatment for the mentally disabled 70

APPENDIX — Narrative Summary of Record A1

TABLE OF AUTHORITIES

Cases: Page

Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947) 6

Alaska v. American Can Co., 358 U.S. 224 (1959) 6

Allen v. State Board of Elections, 393 U.S. 544 (1969) 14, 53, 54

Appalachia Power Co. v. American Institute of Certified Public Accountants, 80 S.Ct. 16 (1959) 25

Bell v. Wolfish, 441 U.S. 520 (1979) 65, 66

Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) 25

Brown v. Board of Education, 356 U.S. 148 (1954) 13, 50

Calhoun v. Harvey, 379 U.S. 134 (1964) 54

Cannon v. University of Chicago, 441 U.S. 677 (1979) 13, 14, 15, 51, 52, 53, 54, 55, 56

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 51

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 23

Commissioner v. Busch's Estate, 387 U.S. 456 (1967) 25

Com. Higher Ed. Assistance Agency v. Abington Memorial Hospital, 387 A.2d 440, 478 Pa. 514 (1978) 27

Cort v. Ash, 422 U.S. 66 (1975) 14, 15, 25, 54

County of Allegheny v. Commw., Dept. of Public Welfare, 33 Pa. Commw. Ct. 267, 381 A.2d 1014 (1978) 31

TABLE OF AUTHORITIES — *(Continued)*

Cases:	Page
County of Allegheny v. Mashuda Co., 360 U.S. 185 (1959)	25
Edelman v. Jordan, 415 U.S. 651 (1974)	15, 59
Elkins v. Moreno, 435 U.S. 647 (1978)	26
Estate of Spiegel v. Commissioner, 355 U.S. 701 (1949)	25
Eubanks v. Clarke, 434 F.Supp. 1022 (E.D. Pa. 1977)	30, 31
Ex parte Virginia, 100 U.S. 339 (1880)	50
Fisher v. Blight, 6 U.S. 358 (1805)	36
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)	50
Gardner v. New Jersey, 329 U.S. 565 (1947)	25
General Box Co. v. United States, 351 U.S. 159 (1956)	25
Goldy v. Beal, 429 F.Supp. 640 (M.D.Pa. 1976)	9
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	6, 23
Green v. County School Board, 391 U.S. 430 (1968)	17, 18, 65, 68
Hagans v. Levine, 415 U.S. 528 (1974)	23, 49
Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3d Cir. 1979)	passim
Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D.Pa. 1977)	passim
Harris v. McRae, 48 U.S.L.W. 4941 (1980)	45
Hellertown Mfg. Co. v. Comm. of Pa., 480 Pa. 358, 390 A.2d 732 (1978)	27

TABLE OF AUTHORITIES — *(Continued)*

Cases:	Page
Helvering v. Davis, 301 U.S. 619 (1937)	13, 51
Helvering v. Stuart, 317 U.S. 154 (1942)	26
Henderson Co. v. Thompson, 300 U.S. 258 (1937)	25
Hess v. United States, 361 U.S. 314 (1960)	6
Hills v. Gautreaux, 425 U.S. 284 (1976)	16, 52
Hillsbourough v. Cromwell, 326 U.S. 620 (1930)	25
Hoolick v. Retreat State Hospital, 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976); aff'd, 476 Pa. 317, 382 A.2d 739 (1978)	31
Ingraham v. Wright, 430 U.S. 651 (1977)	12, 50
In re Commitment of Ann S., ____ Pa. Super. ____ (August 1, 1980)	31
In re Guzan, 405 A.2d 1036 (Pa. Comwlth. 1979)	31
In re Joyce Z., 123 Pitt. L.J. (Allegheny Cty. 1975)	31
In re Joseph Schmidt, No. CC660 (February 13, 1979, Allegheny Ct. Orphans Court)	31
In re Peterson, 253 U.S. 300 (1919)	64
In the Interest of Carvella Ebron, No. J-181877 (March 19, 1979, Philadelphia Cty.)	31
In the Interest of Anthony Hariss, No. 17034 (April 27, 1976, Delaware County)	31
In the Interest of Stephanie Lamb, No. J-184929 (June 30, 1977, Philadelphia Cty.)	31
In the Matter of Benjamin Jefferson, No. 096177, 083977 (November 28, 1978, Chester Cty.)	31
In the Interest of Maria O'Hara, No. 248 Dec. Term, 1976 (April 7, 1977, Philadelphia Cty.)	31

TABLE OF AUTHORITIES — *(Continued)*

Cases:	Page
In the Interest of Angelo P., No. J-194137 (December 6, 1976, Philadelphia Cty.)	31
In the Interest of Kenneth P., No. J-204067 (March 6, 1979, Philadelphia Cty.)	31
In the Interest of Mary Alice S., No. 75-11919 (April 13, 1976, Delaware Cty.)	31
In the Interest of Moises Santiago, No. 41-CS-1978 (Chester Cty.)	31
In the Interest of Edwin Ward, Nov. Term, 1977 (February 23, 1978 and March 6, 1979, Philadelphia Cty.)	31
In the Matter of Anthony S., No. dp1521-75-11, J-198159 (May 16, 1977, Philadelphia Cty. Juvenile Court)	31
Jackson v. Indiana, 406 U.S. 715 (1972)	13, 50, 61
J.I. Case Co. v. Borak, 377 U.S. 426 (1964)	14, 54
Lau v. Nichols, 414 U.S. 563 (1974)	52
Lemon v. Kurtzman, 411 U.S. 192 (1973)	60
MacGregor v. State Mutual Life Assurance Co., 315 U.S. 280 (1942)	25
McCulloch v. Maryland, 17 U.S. 316 (1819)	12, 50
Maine v. Thiboutot, ____ U.S. ____ (1980)	8, 12, 23, 35, 49
Maryland & Virginia Milk Producers Asso. v. United States, 362 U.S. 458 (1960)	59
Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978)	23
Miller v. Youakim, 440 U.S. 125 (1979)	13, 51

Cases: **Page**

Milliken v. Bradley, 433 U.S. 267 (1977) . . . passim

Milliken v. Bradley, 418 U.S. 717 (1974) 57, 63

Mobil Alaska Pipeline Co. v. United States, 436 U.S. 631 (1978) 36

Morgan v. McDonough, 548 F.2d 28 (1st Cir. 1977) 60

Murdock v. City of Memphis, 87 U.S. 429 (1875) 26

Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) 21

National League of Cities v. Usery, 426 U.S. 833 (1976) 51

National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974) 54

Naughton v. Bevilacqua, 458 F.Supp. 610 (D.R.I. 1978) 55, 56

Northern Securities Co. v. United States, 193 U.S. (1904) 35

O'Bannon v. Town Court Nursing Home, ____ U.S. ____ (1980) 8, 22

O'Connor v. Donaldson, 422 U.S. 567 (1975) . 13, 15, 17, 50, 57, 61

Oregon v. Mitchell, 400 U.S. 112 (1970) 50

Palmer v. Hoffman, 318 U.S. 109 (1943) 26

Parham v. J.R., 442 U.S. 584 (1979) 17, 61

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 36

TABLE OF AUTHORITIES — *(Continued)*

Cases:	Page
Piper v. Chris-Craft Industries, 430 U.S. 1 (1977)	54
Pomeroy's Lessee v. State Bank of Indiana, 68 U.S. 592, 1 Wall. 592, 17 L.Ed. 638 (1863)	59
Propper v. Clark, 337 U.S. 472 (1949)	25
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	25
Regents of University of California v. Bakke, 438 U.S. 265 (1979)	12
Reitz v. Mealey, 314 U.S. 33 (1941)	25
Richards v. United States, 369 U.S. 1 (1962)	25
Rizzo v. Goode, 423 U.S. 362 (1976)	15, 57, 65
Rodriguez v. San Antonio School District, 411 U.S. 1 (1973)	12, 50
Rosado v. Wyman, 397 U.S. 397 (1970)	13, 51
Rudolph v. United States, 370 U.S. 269 (1962)	24
Secretary, Department of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979)	27, 32
Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975)	54
Sims v. United States, 359 U.S. 108 (1959)	25
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950)	25
Steele v. General Mills, 329 U.S. 433 (1947)	25
Sun Cheang-Kee v. United States, 70 U.S. 320 (1865)	59

Cases: **Page**

Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) 16, 18, 60, 65, 66

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943) . . . 36, 54

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) 26

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 14, 53, 54

The Tungus v. Skovgaard, 358 U.S. 588 (1959) . 25, 26

United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki, 358 U.S. 613 (1959) . . 25

United States v. Crescent Amusement Co., 323 U.S. 173, reh. den. 323 U.S. 818 (1945) . . . 16, 36, 58

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 25

United States v. First Nat. City Bank, 379 U.S. 378 (1965) 59

United States v. Katz, 271 U.S. 354 (1926) 36

United States v. Morgan, 307 U.S. 183 (1939) . . . 59

United States v. United States Gypsum Co., 340 U.S. 76 (1950) 6, 59

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 59

United Shoe Machinery Corp. v. United States, 256 U.S. 451 (1922) 23

Virginian Ry. v. Federation, 300 U.S. 515 (1937) 16, 59

Williams v. United States, 341 U.S. 97 (1951) . . . 25

Cases: Page

English Statute:

English Bill of Rights, 1 Wm. & M., sess. 2, c.2 (1689) 36

Federal Statutes and Regulations:

Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349 . . . . . 7, 21

Developmental Disabilities Services and Facilities Construction Act, P.L. 91-517, 84 Stat. 1316 (1970) 38

Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103, 89 Stat. 502 (1975) . 37, 38, 39, 48

Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000, *et seq.*: . . . 10, 23, 34, 36

§6000 . . . . . 45, 46, 56, 61

§6001 . . . . . 5, 45, 55

§6010 . . . . . passim

§6011 61

§6012 . . . . . 49, 52, 55

§6063 . . . . . 45, 46

§6066 46

Mental Retardation Facilities and Community Mental Health Centers Construction Act, P.L. 88-164, 77 Stat. 282, 88th Cong. (1963) . . . 37, 38, 39

Mental Retardation Amendments of 1967, P.L. 90-170, 81 Stat. 527, 90th Cong. (1967), extended by P.L. 91-517, 84 Stat. 1316, 90th Cong., 1st Sess. (1969) 38, 47

Page

Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, P.L. 95-602, 92 Stat. 2955 (1978) 38, 44

28 U.S.C. §1331 49

28 U.S.C. §1343(3) 49

28 U.S.C., F.R.Civ.Pro. 52(a) 6

28 U.S.C., F.R.Civ.Pro. 53 58

42 U.S.C. 1983 ..... 12, 23, 49, 53

45 Fed. Reg. 31006 20

45 Fed. Reg. 31014 20

Federal Legislative History:

Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973, Hearing before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.427 and S.458 . 39, 41, 42, 43, 44, 47

Developmentally Disabled Assistance and Bill of Rights Act, 1974, Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.3378 ..... 39, 40, 45, 47

Developmentally Disabled Assistance and Bill of Rights Act, 1975, Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.462 ..... 40, 48

Federal Legislative History: Page

Mental Retardation Amendments of 1967, Hearing before the Subcommittee on Health of the Committee on Labor and Public Welfare, U.S. Senate, on S.1099 and H.R.643 and S.389 . . 38

Mental Retardation and Other Developmental Disabilities, 1969, Hearings before the Subcommittee on Health of the Committee on Labor and Public Welfare, U.S. Senate, on S.2846 . 38

H.Conf.Rep. No. 94-473, reprinted, 1975 U.S. Code, Cong. & Ad. News 943 . 14, 40, 44, 47, 48, 50, 51, 53

H.Rep. No. 694, reprinted, 1963 U.S. Code, Cong. & Ad. News 1054 37

H.R. No. 94-58 47

H.Rep. No. 95-1188, reprinted, 1978 U.S. Code, Cong. & Ad. News 7312 . . . . . 45, 46, 50, 52

S.Rep. No. 94-160, 94th Cong., 1st Sess. (1975) . 11, 39

1967 U.S. Code, Cong. & Ad. News 2071 . . . . . 38, 42

1978 U.S. Code, Cong. & Ad. News 7415 36

Senate J., 1st Sess., 150 (1789) 37

121 Cong. Rec.:
- 9965 44
- 9977 44
- 9978 45
- 16470 46
- 16510-20 . . . . . 47, 48, 52
- 16516 . . . . . 15, 44, 46, 51, 52
- 16517 46
- 16520 46
- 16522 47

Page

29309 48
29817 39
29818 48
29820 ..... 39, 46
29821 ..... 47, 48

124 Cong. Rec.:
S2519 37
S2521 46
H9986 46
S15547-8 ..... 48, 71
S15557 37
S15562 ..... 37, 42
S15569 71
S15571 42
S15657 71
S15561 45
S15662 ..... 15, 52
S15663 ..... 15, 52
S18996 45

125 Cong. Rec. H3637 22

126 Cong. Rec. S1826 22

126 Cong. Rec. H3497 22

Pennsylvania Statutes, Regulations and Legislative History:
Mental Health and Mental Retardation Act of 1966,
50 Pa.C.S.A. §§4101, *et seq.*: 27, 2A
§4102 28
§4201 28
§4301 33
§4406 ..... 9, 33
§4508 32
§4509 32

TABLE OF AUTHORITIES — *(Continued)*

	Page
1 Pa.C.S.A. §1921	27
Act 424, Laws of Pennsylvania (May 15, 1903)	2A
Act 42, Laws of Pennsylvania (April 4, 1907)	2A
Act of June 12, 1913, 32 Laws of Pennsylvania 494	2A
6 Pa. Bull. 2883 (Nov. 13, 1976)	9, 32
1966 Pa. Legis. J., 3d Spec. Sess., No. 33 (Sept. 27, 1966)	27
All States' Habilitation Statutes	70
Other Authorities:	
Adams, Mental Retardation and Its Social Dimensions (1971)	3
Blatt, Exodus From Pandemonium: Human Abuse and a Reformation of Public Policy (1970)	4
Comptroller General, Report to the Congress, Returning the Mentally Disabled to the Community: Government Needs to Do More (1977)	46
Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 (1971)	37
Haskell, Mental Deficiency Over a Hundred Years, 100 Am. J. Psychia. 107 (1944)	3
Heal, et al., Research on Community Residential Alternatives for the Mentally Retarded, in 9 International Review of Research on Mental Retardation (Ellis ed. 1978)	5
Henig, Maxims, in Branch's Principia Legis et Aetquitatis	68

TABLE OF AUTHORITIES — *(Continued)*

Other Authorities: **Page**

HEW, Special Report: Mental Retardation, Hearings before the Subcommittee on Departments of Labor, HEW, and Related Agencies of the House Committee on Appropriations, 96th Cong., 2d Sess., Part 2 46

The History of Mental Retardation (Rosen, Clark & Kivitz eds. 1976) 3

Howe, Final Report of the Superintendent to the Trustees of the Massachusetts School for Idiotic Children (1874), quoted in President's Committee on Mental Retardation, Mental Retardation: Past and Present (1977) 2

Kanner, A History of the Care and Study of the Mentally Retarded (1964) 3

Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975) 64

President's Panel on Mental Retardation, Report of the Task Force on Law (1963) 37

Seguin, The Moral Treatment, Hygiene and Education of Idiots and Other Backward Children . 3

Sloan, Four Score and Seven, 68 Am. J. Ment. Defic. 6 (1963) 3

Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784 (1978) 60, 64

Thorpe, Constitutions and Charters 36

Page

Wolfensberger, "The Definition of Normalization: Update, Problems, Disagreements and Misunderstandings," in Normalization, Social Integration and Community Alternatives (Flynn & Nitsch eds. 1980) 4A

Wolfensberger, The Origin and Nature of Our Institutional Models, in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel & Wolfensberger eds. 1969) 3

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UNITED STATES OF AMERICA,
Respondents

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS
TERRI LEE HALDERMAN, *et al.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated December 13, 1979, is reported at 612 F.2d 84 (3d Cir. 1979) and appears at 89a

et seq. The opinion of the District Court, dated December 23, 1977, is reported at 446 F.Supp. 1295 (E.D. Pa. 1977), and appears at 6a *et seq.* The District Court's opinion and judgment of March 17, 1978, reported at 446 F.Supp. 1295 (E.D. Pa. 1978), appears at 76a *et seq.*

STATEMENT OF THE CASE

"Now the danger of misdirection in this pious and benevolent work is, that two false principles may be incorporated with the projected institutions which will be as rotten piles in the foundations and make the future establishments deplorably defective and mischievous. These are, first, close congregation; and, second, the life-long association of a large number of idiots; whereas, the true, sound principles are: separation of idiots from each other; and then diffusion among the normal population . . . For these and other reasons it is unwise to organize establishments for teaching and training idiotic children, upon such principles as will tend to make them become asylums for life . . . *Even idiots have rights* which should be carefully considered![1]"

With these cautionary words, Dr. Samuel Gridley Howe, founder of the first public facility for the retarded in the United States, prescribed in 1874 how, and how not, to provide the education and training which retarded people require.

Dr. Howe's admonition was not heeded. The small, short-term community schools created in the mid-nine-

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1. Howe, *Final Report of the Superintendent to the Trustees of the Massachusetts School for Idiotic Children* (1874), quoted in President's Committee on Mental Retardation, *Mental Retardation: Past and Present* 5 (1977) (emphasis in original).

teenth century have become massive isolated institutions in the late twentieth century in which retarded people endure grotesque lives forced upon them by lack of alternatives.[2] Although death, injury, violence, physical and psychological abuse are familiar to all who know institutions, their destructive consequences are rivalled by those of the pervasive degradation, hopelessness and

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2. In 1838, the first school for the retarded was established in the Saltpetriere mental hospital outside Paris and in 1842 a portion of the Bicetre mental hospital was set aside for such training. A facility for the retarded was founded in 1842 in Berlin, in 1846 in Leipzig, and in the same year in Bath, England. In January, 1846, Judge Horatio Byington offered a resolution to the Massachusetts legislature calling for a commission to investigate the status of the retarded in the state; the commisison's 1848 report was followed by the opening of an experimental school in South Boston in October, 1848, headed by Dr. Howe. A private school for the retarded had opened in Barre, Massachusetts, just three months before Howe's. These first facilities were quickly followed by schools for the retarded in New York in 1851, Pennsylvania in 1852, and Ohio in 1857. The early schools had provided intensive training for short periods of time and had great success in returning retarded people to life in their communities. By 1888, about 4,000 people lived in the fourteen state and private institutions for the retarded in the United States. These developments are reported in detail in 1 *The History of Mental Retardation* (Rosen, Clark & Kivitz, eds., 1976).

For the evolution of institutionalization of the retarded, see Testimony of Dr. Philip Roos, Tr. 1-94 to 95 (citations to transcript volume number and pages); District Court opinion at 446 F.Supp. at 1299-1300; 10a-13a (citations to opinions below are to the Petitioners' Joint Appendix filed with their petitions for certiorari); Adams, *Mental Retardation and Its Social Dimensions* 16-51 (1971), Wolfensberger, *The Origin and Nature of Our Institutional Models*, in President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* (Kugel and Wolfensberger eds. 1969), Kanner, *A History of the Care and Study of the Mentally Retarded* (1964); Sloan, *Four Score and Seven*, 68 Am. J. Ment. Defic. 6 (1963); Haskell, *Mental Deficiency over a Hundred Years*, 100 Am. J. Psych. 107 (1944); Seguin, *The Moral Treatment, Hygiene, and Education of Idiots and Other Backward Children* (1846).

helplessness which comes of denial of individual attention, training and care.[3]

In recent decades, every element in American society touched by the retarded has reponded with increasingly determined action to halt this decimation. Congress, state legislatures, federal and state courts, executive officials, and other citizens have adopted unequivocal mandates both to protect the rights of people in institutions and to ensure provision of individualized community services to those who need them, avoiding the ghastly spectre of retarded people being dumped from inadequate institutions into stark isolation outside them.

For the retarded, life outside the large congregate custodial institution emphatically does not mean life in a monolithic single-choice system called "the community." This common "either-or" misconception fails to appreciate the stunning variety of residential and sup-

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3. 446 F.Supp. at 1302-1311; 18a-40a; 612 F.2d at 92-94; 103a-108a. One experienced commentator has described "the feeling of hopelessness and helplessness that permeates the minds and souls of those in our institutions and those others of us who visit there. For the ordinary condition in our institutions is not one involving violence or brutality or illegal treatment — although these are much more ordinary in institutions than they are in the community. The ordinary condition is boredom more than brutality, legal abuse more than illegal assault, and a subtle degradation rather than a blatant holocaust. However, this genteel catastrophe is deadening, it's overwhelming, for it floods out whatever opportunities residents and staff have to rise together in some common attempt for personal dignity and mutual human concern. This subtle catastrophe is the mortar filling in the cracks and anchoring the devastation and permanence manufactured by the heavy hand of the System." B. Blatt, *Exodus from Pandemonium: Human Abuse and a Reformation of Public Policy* 79-80 (1970).

portive services available to and now serving retarded citizens.[4]

Petitioners insist that the issue before this Court is one of statutory interpretation. Did the Pennsylvania legislature (and state courts of state-wide jurisdiction) and the United States Congress, all acting with full knowledge of the facts — in essence, the facts unchallenged here — mean what they said when they declared explicit "rights" for retarded people to habilitation, individually determined and provided in an appropriate environment? While the answer to this question is affirmative, as the statute's plain words and history shows, the undisputed facts and procedural history must be examined for their dispositive effect on both the liability and relief determinations by the courts below.

This case presents no issue regarding the wisdom or propriety of avoiding unnecessary institutionalization of

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4. Among these services are "diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with such disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services and transportation services necessary to assure delivery of services to persons with developmental disabilities." 42 U.S.C. §6001(8)(A). "The term 'alternate community living arrangement services' means such services as will assist persons with developmental disabilities in maintaining suitable residential arrangements in the community, and includes in-house services (such as personal aides and attendants and other domestic assistance and supportive services), family support services, foster care services, group living services, respite care, and staff training, placement, and maintenance services. *Id.* at §6001(8)(E). Other services are defined at §§6001 (8)(B), (C), (D) and (F). As of 1971, Pennsylvania had identified at least ten different models of community services. Tr. 7-85 Dybwad; PARC Ex. 24; Ex. P-16; *see* Ex. G-48 at photographs 69-82. For a taxonomy of residential facilities in the community, *see* Table 2 in Heal, *et al.*, *Research on Community Residential Alternatives for the Mentally Retarded*, in 9 International Review of Research on Mental Retardation (Ellis ed. 1978). *See* Tr. 5-141 to 161 Girardeau (describing range of services available in Pennsylvania).

people who are retarded.[5] This case presents no issue regarding the brutal and abominable conditions to which plaintiffs were subjected at the Pennhurst State School and Hospital nor does it present any questions regarding *facts* concerning the ability of all retarded people to learn and grow, their need to do so in an appropriate environment through individual habilitation plans, and, finally, the disutility of institutions in providing benefits to retarded people.[6]

In addition, this case presents no question regarding the limits imposed on the states by the Constitution when they confine retarded persons, for whatever reason in whatever environment.[7]

A narrative summary of the record in this case is attached as an Appendix to this brief.

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5. In his opening statement, Deputy Attorney General Norman Watkins stated, "The Commonwealth quite simply is not defending Pennhurst." Tr. 1-26. The institution had itself been slated for elimination by Pennsylvania with the intention of placing virtually all of its residents into community facilities. Tr. 28-45 to 50 Rice, with defendant officials and their retained experts determining that every Pennhurst resident could be served in a variety of community settings. 446 F.Supp. at 1312, 1313, 1325; 43a, 47-48a; 78a; 612 F.2d at 116; 160a; citations to record at notes 194 to 196 *infra*.

6. The defendants do not challenge any factual findings on appeal as clearly erroneous. *See* F.R.Civ.Pro. 52(a); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274-275 (1949) (application to facts based on expert testimony); cases cited at Argument I.E. *infra*.

7. Constitutional questions considered by the District Court were not decided by the Court of Appeals or raised in this Court. *See Aetna Casualty Co. v. Flowers*, 330 U.S. 464 (1947); *Alaska v. American Can Co.*, 358 U.S. 224 (1959); *Hess v. United States*, 361 U.S. 314 (1960).

SUMMARY OF ARGUMENT

1. Although the nineteenth century founders of the first facilities for the retarded — small short-term community schools — warned against the possibility, those community schools became the large long-term ineffective institutions of the late twentieth century in which physical and psychological abuse are as common as chronic denial of individual attention, training and care. In recent decades, Congress, state legislatures, courts, executive officials and other citizens have acted both to protect the rights of people in institutions and to ensure provision of individualized community services to those who need them, avoiding the spectre of retarded people being dumped from inadequate institutions into unstructured isolation outside them.

2. For the retarded, life outside the custodial institution emphatically does not mean life in a monolithic single-choice system called "the community." This common "either-or" misconception, adopted in petitioners' argument, fails to appreciate the stunning variety of residential and supportive services available to and now serving citizens in "institutions" quite different from those condemned by Congress and the Pennsylvania legislature.

3. Certiorari should be dismissed as improvidently granted because of changes in the law, proposed regulatory changes, recent decisions of the Court, state law and the factual nature of this case.

a. The Department of Health and Human Services recently proposed changes in developmental disabilities program regulations which significantly strengthen the rights recognized in 42 U.S.C. §6010. *See Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 358 (1972).

b. Congress has enacted the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349, Section 9 of which expresses the sense of Congress that fed-

eral agencies should ensure use of federal funds for "correction or elimination of such unconstitutional or illegal conditions" as, respondents suggest, are represented by the unnecessary confinement of hundreds of individuals at the Pennhurst institution.

c. Two decisions of the Court after certiorari was granted affect this case. *O'Bannon v. Town Court Nursing Home*,____U.S.____(1980), holding that institutionalized people have no right to remain in a decertified facility even if they would be harmed by a transfer to a new facility, and *Maine v. Thiboutot*,____U.S.____(1980), resolving the question of whether 42 U.S.C. §1983 provides a private remedy for violations of a federal statute.

d. State law supports all aspects of the judgment below, including the right to habilitation in the least restrictive alternative and individual determination of the needs of disabled people.

e. For the parties before the Court in this case, the facts are undisputed. Retarded people can be treated without institutionalization and at less cost. There are funds available in Pennsylvania to implement defendants' own policies. The Pennhurst institution itself was scheduled by the state Department of Public Welfare to be "empty" by 1983. Each member of the Court of Appeals found petitioners' actions with regard to respondents' at Pennhurst to be totally unacceptable. This case boils down to one of a factual nature and it is therefore inappropriate for review on certiorari.

4. Pennsylvania statutory and case law guarantee retarded persons the right to habilitation, individually determined and provided in an appropriate least restrictive setting. State law is an independent and dispositive ground for the judgment of the Court of Appeals.

a. The state statute guarantees "adequate . . . mental retardation services for all persons who need them." Pennsylvania legislative history, which according to state law must be considered if there is any doubt as to

the plain meaning of a statute, demonstrates that, "The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it."

b. Both the majority and the dissenting opinions in the Court of Appeals recognized, as petitioners are loath to do, that the judgment of that Court rested its least restrictive environment rule on state law in addition to federal law. State law requires that 1) individual needs be fully addressed, 2) non-institutional care be favored, 3) habilitation be provided in community settings where appropriate, 4) there be dramatic institutional improvements. Decisions of state-wide courts, including one of August 1, 1980, and of local courts, have interpreted Pennsylvania law consistently with the mandate of the Court of Appeals.

c. For people presently at Pennhurst, a right to be moved to a less restrictive environment exists under state law. For potential future commitments to Pennhurst, no person may be confined there without a judicial determination that the person's needs cannot be satisfied through development of a community program; this is the case under state regulations adopted after a federal court voided the state commitment statute, 50 Pa. C.S.A. §4406. *Goldy v. Beal*, 429 F.Supp. 640 (M.D. Pa. 1976); 6 Pa. Bull. 2883 (Nov. 13, 1976). Petitioners neglected to bring this case and the ensuing regulations to the Court's attention.

5. Initial Congressional reaction to obsolete custodial facilities providing inappropriate services to the retarded was legislation beginning in 1963 providing financial aid to the states for construction and grants to encourage community services. This approach did not work, Congress found, and after several years of intense study, many hearings and consideration of alternative initiatives, Congress understood that the conditions under which retarded people are confined in most institu-

tions render impossible the fulfillment of the habilitation standard which Congress established as national policy. Therefore, in 1975, Congress departed from the existing laws' sole emphasis on funding and enacted a Bill of Rights explicitly intended to eliminate the inappropriate care to which Congress found a "vast majority of the developmentally disabled" were being subjected. This consummate equal rights initiative, strengthened in 1978, is the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*, the federal statutory ground on which the Court of Appeals rested its judgment.

a. Two purposes are evident in the title of the statute, to *assist* the developmentally disabled and to provide the beneficiaries of the Act with a *Bill of Rights*. In English and United States history, the phrase "Bill of Rights" has ringing import; it has always been used to refer to the establishment of rights and the plain meaning of the Bill of Rights section of the Act, 42 U.S.C. §6010, admits of no other interpretation. Section 6010 codifies "a right to appropriate treatment, services and habilitation," §6010(1), "designed to maximize the developmental potential of the person," and "provided in the setting that is least restrictive." §6010(2).

b. Every finding of the lower courts in this case is matched by a congruent prior finding of the Congress:

> 1) Mental retardation is an educational handicap, not a disease; retarded people are not subhuman, objects of pity, eugenic misfits or eternal children.
>
> 2) Misconceptions and myths have resulted in segregation, sterilization, stigmatization and institutionalization of retarded people.
>
> 3) Congress adopted the developmental model of services to retarded people, finding that, with proper habilitation, every retarded person is capable of growth toward the goal of self-sufficiency; therefore custodial care "must be rejected."

4) Despite a decade of federal funding for institutions, deplorable conditions and scandals prompting successful litigation continued to plague such facilities; dramatic changes were required to benefit the inmates of institutions.

5) Persons forced to vegetate on wards of institutions become further physically and mentally handicapped.

6) State officials conceded that inhumane and non-habilitative conditions continue to exist in institutions for the retarded.

7) Institutions generally do not provide habilitation.

8) Institutions are dangerous.

9) "Most of the institutions themselves are anachronisms, and . . . rapid steps should be taken to phase them out." S.Rep. 94-160 at 32-33.

10) Reducing institutional population is not sufficient; creation of community services, structured and individually determined, is the necessary remedy.

11) The "vast majority of persons now institutionalized should not be in these institutions at all." S.Rep. 94-160 at 33.

12) Normalization is integral to habilitation for retarded people and it must occur, by definition, in the least restrictive environment appropriate to the individual's needs.

13) Aware of the unnecessary expense of institutions, particularly where no habilitation is provided, Congress determined that the states must develop expanded community services; Congress expected that the use of billions of dollars from various federal programs for the disabled would free more dollars for community care. The Bill of Rights Act was intended to lever already available federal and state funds for the benefit of the disabled.

c. The hearings, debates, committee reports and the structure of the Bill of Rights Act demonstrate that Congress intended in §6010 to codify those civil rights recognized by the courts.

6. Developmentally disabled people may assert their rights, and federal courts may provide a remedy, under either 42 U.S.C. §1983 or an implied private right of action. Both these alternatives are available to effectuate the Congressional intention that people such as those confined at Pennhurst have their day in court.

a. 42 U.S.C. §1983 provides a remedy for official deprivation of federal statutory rights. *Maine v. Thiboutot*, ____ U.S. ____ (1980). The Bill of Rights Act establishes substantive rights to individualized habilitative services and to an appropriate habilitative environment. The power of Congress to establish such rights is not disputed by petitioners, although they deny Congress' intention to do so. That power, however, is clear and stems from two alternative sources.

1) Legislation enacted pursuant to Section 5 of the Fourteenth Amendment may impose severe restraints on state action and discretion, with the Court giving great deference to Congressional findings that particular steps are "appropriate" exercises of legislative authority. *Regents of University of California v. Bakke*, 438 U.S. 265, 302 n.41 (1979) (collecting cases); *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). Congress, prompted by the conditions of the disabled and judicial recognition of their constitutional rights, recorded its intention that the Bill of Rights Act enforce the Fourteenth Amendment. Rights violated at Pennhurst and encompassed in the Act include those to receive more than zero education, *Rodriguez v. San Antonio School District*, 411 U.S. 1 (1973), personal security, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), institutionalization the nature and duration of

which bear a reasonable relation to its purpose, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), freedom from custodial care for non-dangerous persons capable of living safely with assistance outside the institution, *O'Connor v. Donaldson*, 422 U.S. 567, 576 (1975), and freedom from training and education in separate stigmatizing and unequal facilities, *Brown v. Board of Education*, 356 U.S. 148 (1954).

2) Having accepted federal funds under the Bill of Rights Act for its unified state-county retardation program, Pennsylvania must comply with the requirements imposed by Congress under its spending clause powers. *Helvering v. Davis*, 301 U.S. 619 (1937); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Miller v. Youakim*, 440 U.S. 125 (1979).

b. Petitioners grasp at straws when they inject a question on which certiorari was not granted: whether the Bill of Rights Act can be enforced exclusively by a federal funding cut-off by the Secretary of Health and Human Services on her own or under a court order. The "power to cut off federal funds for noncompliance with statutory requirements," a power resting with federal departments under every federal-state cooperative program, has repeatedly been "considered and rejected" by the Court as a basis upon which to deny judicial power to review state action as to individuals. *Rosado v. Wyman*, 397 U.S. 397, 420 (1970); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). There is no word or phrase in the Bill of Rights Act or its legislative history even hinting at an intention to lodge exclusive enforcement in a funding cut-off remedy. To the contrary, Congress specifically intended the Bill of Rights Act to support and encourage legal action by disabled people themselves and, further, Congress established a system to protect and advocate the rights of disabled people through pursuit of legal remedies. The Secretary's authority to cut off program funds can be exercised only in

the extreme circumstance where an entire program fails; that authority is an insufficiently delicate instrument to vindicate particular individuals' personal rights. And it is personal rights which are the concern of §§6010(1) and (2).

c. An independent though consistent alternative to §1983 which provides a judicial remedy for respondents is their implied private right of action under the Bill of Rights Act itself. The question is "one of statutory construction" and the Court's "task is limited solely to determining whether Congress intended to create the private right of action asserted. . . ." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Cases finding implied private remedies set forth indicia for taking the measure of statutes. A private remedy is implied where "the statute in question at least prohibited certain conduct or created federal rights in private parties," *Touche Ross & Co., supra*, 442 U.S. at 569; *Cannon, supra*, 441 U.S. at 690 n. 13, where it "make[s] effective the congressional purpose," *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964), where the right intended by Congress will thereby be enforced, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and, finally, a remedy is implied "for the enforcement of civil rights, even when Congress has spoken in purely declarative terms." *Cannon, supra*, 441 U.S. at 690 n. 13. The Bill of Rights passes muster under these criteria; it is a civil rights statute enacted to benefit a particular class and a private action will generate enforcement in accordance with the policies and expectations of Congress.

1) *Cort v. Ash*, 422 U.S. 66, 78 (1975), provides the familiar template for analysis of this question and each of the four *Cort* factors are satisfied. Plaintiffs below are the undisputed "especial beneficiaries" of the Bill of Rights Act and Congress fully intended that the right to habilitation "should be protected and assured by Congress and the courts." H. Conf. Rep. 94-473 at 42. Con-

gress was aware and approved of institutional disability litigation and expected "substantial legal and advocacy pressure," 121 Cong. Rec. 16516 (Sen. Williams) and "challenges in the courts, for the kinds of rights which are being guaranteed in this legislation. That is the way it is done." 124 Cong. Rec. S15662-15663 (Sen. Kennedy).

2) The last two *Cort* factors are satisfied in that a private remedy is not inconsistent with the underlying purpose of the legislation which is to secure for *individuals* that habilitation which adequately serves their needs. The purpose is both to avoid the use of funds for illegal and unconstitutional purposes and to protect individuals against the effects of such practices. *Cannon, supra*, 441 U.S. at 703-704. Also, the cause of action is not one traditionally relegated to state law. Congress was aware that actions to secure services to retarded people to meet their habilitative needs have been brought in federal courts for many years under the Constitution and federal statutes. The particular §6010 cause of action has no counterpart in state law and cannot be said to be "traditionally relegated" to the states; there is and can be no reason to forbid federal courts to act upon the separate federal interests which Congress articulated in the Bill of Rights Act. Legitimate state concerns are not impaired by an implied remedy. Persons claiming an official denial of habilitation must show a casual connection between the injury and the allegedly wrongful conduct. *Rizzo v. Goode*, 423 U.S. 362 (1976). State officials are entitled to a qualified immunity for actions undertaken in good faith. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Persons actually injured by denial of care, however, will be entitled to injunctive relief ensuring future habilitation. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

7. Where government officials adamantly refuse to remedy their violations of people's rights and where pro-

tection of their federal and statutory rights would otherwise be impossible, individual determinations of need and appointment of a special master with circumscribed supervisory duties does not violate principles of federalism and is not an abuse of discretion. With defendants below refusing on three occasions to devise and present their own proposed remedies, the courts below had no choice but to fashion equitable relief based on the "circumstances present and the options available in each instance." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 27 n. 10 (1971).

a. Rather than wrest control of the retardation system from petitioners, the Court of Appeals carefully sculpted a minimal planning and supervisory role for master. In addition, the court found "it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated."

b. Once liability has been determined, lower courts have broad discretion in the sensitive and delicate task of fashioning relief and the Court "will not direct a recasting of the decree except upon a showing of abuse of discretion." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944); *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976); *Milliken v. Bradley*, 433 U.S. 267, 280 n. 15, 281 (1977). Where Congress has by statute declared a national policy or where the public interest may be furthered, the Court's rule has been the relief ought to accommodate those circumstances. *E.g., Virginian Ry. v. Federation*, 300 U.S. 515, 552 (1937).

c. The individual determination remedy is one well within the lower court's discretion. Careful review of the needs and condition of every resident of Pennhurst is a *sine qua non* for determining whether an improved Pennhurst or one of the variety of habilitative alternatives satisfy state and federal law. The nature of the violation of respondents' rights consists of the failure to pro-

vide individually determined habilitation. It is patently frivolous to suggest, as petitioners do, that the question of whether a person is receiving habilitation sufficient to justify confinement at Pennhurst is nonjusticiable. *O'Connor v. Donaldson*, 422 U.S. 563, 574 n. 10 (1975) ("plainly unacceptable to suggest that the courts are powerless to determine whether" "Donaldson was receiving treatment sufficient to justify his confinement"). *See Parham v. J.R.*, 442 U.S. 584, 617 (remand for consideration of individual claims). Retardation and techniques for habilitation are not afflicted by the vagaries of the baffling field of psychiatry; determination of a retarded person's habilitative needs is accomplished through individualized methods and procedures, and with goals, set forth with specificity by Congress. The lower courts did not presume to prescribe habilitation for individuals but left that task in the first instance to professionals acting under professional standards.

d. Petitioners' refusal to suggest any plan of their own devising to remedy the systemic and deplorable violations of respondents' rights compelled the District Court to appoint a special master to develop and supervise enforcement mechanisms. As the court found, implementation would otherwise have been "impossible." The master in no way supplants state and local authorities; the defendants participate in the structuring of relief and, in fact, remain free to offer "a plan that promises realistically to work." *Green v. County School Board*, 391 U.S. 430, 439 (1968). Barring such a plan, a federal court must exercise its broad and flexible power to effectuate a remedial, non-punitive decree. *Milliken v. Bradley*, 433 U.S. 267, 288 (1977). The record below demonstrates what the courts below found as facts, *i.e.*, the failure and refusal of the state and county petitioners to provide services mandated by law and their continued recalcitrance after their liability was determined. "Judicial authority enters only where local authority defaults."

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). A more persuasive case of local default can hardly be imagined.

e. Undisputed facts have proven "abominable" conditions in an institution for the retarded condemned by the dissenting judges as "one of the worst institutions of its kind in the world." Every person at Pennhurst, an institution slated by Pennsylvania to be "empty" by 1983, can and should be care for in a continuum of less costly more effective structured community settings. In its equitable discretion, and under the Bill of Rights Act, the District Court properly prohibited further admissions to the institution (Pennhurst policies and state commitment laws already precluded admissions) and required that the antiquated facility be replaced through the development of individually appropriate services. Pennhurst is one of the class of institutions which Congress intended be "phased out." The Court of Appeals ignored these critical facts, acted on hypothetical situations not supported by facts in the record, and erred in modifying these portions of the District Court's order.

8. Declaration of a federal and state statutory right to habilitation threatens neither the policies nor the practices of the states.

a. Relief in this case is tailored to the specific local circumstances of highly developed community services, availability of unspent local funds for Pennhurst dispersal, and years of unjustifiable deprivation of respondents' rights. No mold of universal applicability has been or should be cast by any court because "there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Swann*, *supra*, 402 U.S. at 27 n. 10, quoting *Green v. County School Board*, 391 U.S. 430, 439 (1968).

b. Every one of the fifty states has, by statute, established some or all of the rights and policies recognized by the lower courts in the case at bar. 26 states establish a right to habilitation or treatment, 17 establish a state responsibility or policy or provide habilitation or treatment, 8 explicitly require an individualized plan and 5 either specify facilities to provide habilitation or treatment or grant authority to enforce laws relating to habilitation or treatment in community centers; some states, of course, fall into several of these categories. *See* Table *infra*, listing states by category. An increasing number of states have responded to federal developments by enacting laws designated to guarantee rights to developmentally disabled people and ensuring small-scale community services to people no matter how severe their disability may be.

c. States' legitimate interests in adopting and pursuing their own strategies for compliance with the Bill of Rights Act are supported, not undermined, by the decisions of the courts below in this case. States would not be required to immediately deinstitutionalize without regard to the context within which each operates. The lower courts' "programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke . . . " *Milliken v. Bradley*, 433 U.S. 267, 290 n. 22 (1977). Nor did Congress mandate the impossible. A state's effective action to provide individually appropriate habilitation under §6010 cannot be completed in a day, but it can be undertaken.

ARGUMENT

I. Certiorari should be dismissed as improvidently granted because of changes and proposed changes in the law, recent decisions of this Court, the dispositive effect of state law and the factual nature of this case.

Changes in the law, proposed regulatory changes, state law, recent decisions of this Court, and the factual nature of the case, singly and in combination, strongly indicate that certiorari has been improvidently granted.

A. Developmental Disabilities Program — Proposed Regulations

Among the issues before the Court is the interpretation of Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6010. The Department of Health and Human Services recently published proposed regulations defining and significantly strengthening the rights recognized in the statute. 45 Fed. Reg. 31006, 31014 at §1385.2 and §1385.3 (c).

These regulations for the first time define "Institution" as "any residential facility in which a person with a developmental disability is housed with non-related persons." §1385.2. This makes it clear that references to programs in "institutions" or standards for "institutions," *e.g.*, §6010(3), refer to small community facilities and not simply large isolated custodial facilities.

In addition, the regulations state:

> The treatment, services, and habilitation for persons with developmental disabilities *shall* be designed to maximize the developmental potential of the person and *shall* be provided in the setting that is least restrictive of the person's personal liberty.

§1385.3(c)(2) (emphasis supplied). In the statute, §6010(2), each "*shall*" above is "should;" the language is otherwise the same.

Where legal requirements in this disability law area are in the process of relevant important change, dismissal of certiorari is appropriate. *Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 358 (1972) (challenge to state mental commitment law):

> We are informed that the statutes governing civil commitment are presently undergoing substantial revision, designed to provide greater substantive and procedural safeguards to committed persons. Accordingly, it seems a particularly inopportune time for this Court to consider a comprehensive challenge to Defective Delinquency Law.

B. Enactment of P.L. 96-247, Civil Rights of Institutionalized Persons Act, 94 Stat. 349

The Civil Rights of Institutionalized Persons Act, P.L. 96-247, was approved May 23, 1980. Although the law is predominantly concerned with procedures for intervention by the United States in institutional litigation, one section has bearing in this case:

> Sec. 9. PRIORITIES FOR USE OF FUNDS.
> (a) It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision

to require the redirection of funds from one program to another or from one State to another.

The *Pennhurst* litigation was before Congress in its consideration of this Act.[8] As Representative Kastenmeir, reporting the Conference Report, explained, Section 9 is a " 'sense of Congress' resolution that priority should be given to correcting unconstitutional conditions first." 126 Cong. Rec. H3497 (May 12, 1980).

In view of the "deplorable conditions" which all concede exist at Pennhurst, and the fact that Pennhurst received "extensive funding under the Federal Medicaid statute — more than $6 million of the $27 million" budget in 1975-1976 (Rice, Tr. 26-14), Brief for Petitioners at 26 n. 43, dismissal of certiorari would be appropriate to permit federal agencies to comply with Section 9's intent to ensure use of federal funds for "correction or elimination of such unconstitutional or illegal conditions," Sec. 9, P.L. 96-247, to which respondents are subjected.

C. Recent Decisions of this Court Resolve Several Important Issues in this Case.

After certiorari was granted, this Court decided *O'Bannon v. Town Court Nursing Home*, ____ U.S. ____ (1980), which, in part, held that institutionalized nursing home residents do not have a right to remain in a decertified facility, even if they would be harmed by a transfer to a new residence. In *Halderman*, the institution was condemned by every member of the Court of Appeals which required an individual determination of the need for improved institutional care or one of a variety of non-institutional alternatives. The rationale of *O'Bannon* supports the holding in *Halderman*.

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8. *E.g.*, 125 Cong. Rec. H3637 (May 23, 1979) (Comments of Rep. Railshack); 126 Con. Rec. S1826 (Feb. 27, 1980) (Comments of Sen. Thurmond).

This Court's June 9, 1980 Order added a question to be addressed: "Does 42 U.S.C. §1983 provide a private remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*?" This question was dispositively considered in *Maine v. Thiboutot*, ____ U.S. ____, 48 U.S.L.W. 4859 (June 25, 1980). *See Hagans v. Levine*, 415 U.S. 528 (1974).

D. State Law Fully Supports All Aspects of the Judgment Below.

Pennsylvania law provides a firm foundation for all aspects of the judgment here on review. Fully discussed below in Section II of the Argument, state statutes, judicial decisions and regulations guarantee plaintiffs an enforceable right to individualized habilitation services in the least restrictive appropriate setting.

This Court has not and should not engage in unnecessary federal statutory interpretation when a sufficient non-federal ground for decision exists. *See* notes 9-13, *infra*.

E. The Dispositive Facts are Undisputed and the Issues are Factual in Nature.

"Concurrent findings of fact by two courts below" are entitled to a presumption of correctness. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 16 (1978), quoting *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949); *Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 455 (1922).

While this case presents important abstract legal questions, its essence is factual. Each member of the Court of Appeals found defendants' treatment of plaintiffs totally unacceptable. All parties agree that retarded people can more effectively be treated without

institutionalization and at less cost. There are funds available in Pennsylvania to implement defendants' own policies, and those policies were accepted by the courts below.

Circumstances in other states may be different but, for the parties before the Court on these undisputed facts, the case is one inappropriate for review on certiorari. *See, e.g., Rudolph v. United States,* 370 U.S. 269 (1962).

II. The District Court and the Court of Appeals *en banc* reasonably interpreted dispositive Pennsylvania statutory and case law providing an enforceable right to habilitation, provided in an individually determined least restrictive setting, thereby rendering unnecessary any further decision by the Court.

Pennsylvania statutory and case law guarantee retarded persons the right to habilitation, individually determined and provided in an appropriate least restrictive setting. As the Court of Appeals held, state law is an independent and dispositive ground for its judgment. The rights recognized below are state law rights.

The following discussion explains why this Court should not and need not venture on an excursion into Pennsylvania state law, describes the Court of Appeals decision as to liability and relief under state law, and, finally, summarizes the manner in which state law provisions explicitly require affirmance of the judgment below.

A. Where the District Court and the Court of Appeals en banc Reasonably Interpreted Pennsylvania Statutory and Case Law, Any Further Decision by this Court is Unnecessary.

Regardless of this Court's own view of particular state law interpretations by the lower federal courts, such interpretations are upheld under the Court's long-

established practices of avoiding involvement in local law disputes and deferring to determinations by the district courts and courts of apppeal:

> In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion.

Bishop v. Wood, 426 U.S. 341, 346 (1976) (note 10, collecting cases, omitted), *Cort v. Ash*, 422 U.S. 66, 73 n.6 (1975) ("indeed, our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect.") Sitting in their respective states and "familiar with the intricacies and trends of local law, *Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1930), the view of the lower courts are accorded the greatest deference in this Court[9] and are not

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9. *Henderson Co. v. Thompson*, 300 U.S. 258, 266 (1937); *Reitz v. Mealey*, 314 U.S. 33, 39 (1941); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942); *Steele v. General Mills*, 329 U.S. 433 (1947); *Gardner v. New Jersey*, 329 U.S. 701 (1949); *Propper v. Clark*, 337 U.S. 472, 486-489 (1949); *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530 (1949); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950) ("This contention was rejected below, and we do not reexamine local law as applied by the lower courts."); *Williams v. United States*, 341 U.S. 97, 100 (1951); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki*, 358 U.S. 613 (1959); *Sims v. United States*, 359 U.S. 108 (1959); *County of Allegheny v. Mashuda Co.*, 360 U.S. 185 (1959); *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Richards v. United States*, 369 U.S. 1 (1962); *Appalachia Power Co. v. American Institute of Certified Public Accountants*, 80 S.Ct. 16 (1959) (Brennan, J., as Circuit Justice); *Commissioner v. Bosch's Estate*, 387 U.S. 456 (1967); *Estate of Spiegel v. Commissioner*, 355 U.S. 701 (1949).

disturbed absent "a plain showing of error," [10] "a definite conviction of error in the conclusion,"[11] or a decision that the lower court is "clearly wrong."[12]

Petitioners' rejoinder to this unbroken line of authority is that the "state law holding was unnecessary and insufficient to support affirmance. *See Murdock v. City of Memphis*, 87 U.S. 429 (1875)." Brief for Petitioners at 41, n.65. *Murdock*, on jurisdiction over judgments of state courts, has nothing to do with the case. In any event, the necessity and sufficiency of the state law holding is shown in Section C below.

Never in its history has this Court expended its energies to parse the meaning of state law when lower federal courts have provided their views.[13] There is no necessity or reason to depart now from this salutary path.[14]

B. The Court of Appeals and District Court Decisions are Based on Independent Dispositive Determinations of a State Law Right to Habilitation, Individually Determined and Provided in an Appropriate Least Restrictive Setting.

Disregarding explicit language in the opinion below, petitioners assert that the Court of Appeals did not "find a state right to treatment in the least restrictive environment." Brief for Petitioners at 41. On the contrary, the court below firmly and unequivocally established de-

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10. *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

11. *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

12. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

13. The Court does not appear to have reviewed a case in which state law was dispositive and then to have reversed the interpretation of state law provided by the lower courts. Cf. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) (no state issue; constitutional issue reached); *Elkins v. Moreno*, 435 U.S. 647 (1978).

14. Significantly, the petitioners themselves are divided in their presentation of their position. The Pennhurst Parents-Staff Association does not claim that the lower courts incorrectly determined state law. Brief for Petitioners at 40.

fendants' liability for violating state law guarantees and, in addition, mandated specific relief responsive to the state law requirement of appropriate habilitation in the least restrictive setting.[15]

Pennsylvania's Mental Health and Mental Retardation Act of 1966, 50 Pa.C.S.A. §§4101 *et seq.*,[16] creates a unified state and county system intended by the legislature to "provide a continuum of services — out-patient, in-patient, diagnostic treatment, evaluation and research, a procedure of commitment under almost all conceivable types of circumstances."[17] Its prime sponsor, Senator Pechan, stated that the legislation's purpose was to guarantee a right to services in whatever setting is appropriate:

> The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. It will make those services available to every citizen in every community which are now available only to a lucky few, in the more progressive communities.[18]

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15. The dissenting judges, unlike the petitioners here, recognized that the "majority seems to implicitly rest its least restrictive treatment rule in part on Pennsylvania law." 612 F.2d at 122; 175a.

Assuming a state law right to treatment, the dissent's discussion of state law concentrated on establishing a proposition not disputed here or by the majority in the Court of Appeals: that institutions are not prohibited under state law.

16. Several provisions of this Act were examined and upheld by the Court last term in Secretary, *Department of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979).

17. 1966 Pa. Legis. J., 3d Spec. Sess., No. 33, 76 (Sept. 27, 1966). (Sen. Sesler), quoted at 612 F.2d at 101; 123a.

18. *Id.* at 100; 123a (Sen. Pechan). Pennsylvania law *in haec verba* permits study of contemporaneous legislative history and the circumstances prompting the law. 1 Pa.C.S.A. §1921; *Hellertown Mfg. Co. v. Pennsylvania*, 480 Pa. 358, 390 A.2d 732 (1978); *Commonwealth Higher Education Assistance Agency v. Abington Memorial Hospital*, 478 Pa. 514, 387 A.2d 440 (1978). The state law was responsive to the community services federal initiatives, notes 30-32 *infra*.

The statutory mandate fulfills the promise of its enactors. "[A]dequate . . . services for all persons who need them" are guaranteed:

> §4201. General Powers and Duties of the Department.
>
> The department [of public welfare] shall have the power, and its duty shall be:
>
> (1) to assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, national origin, settlement, residence, or economic or social status.

50 Pa. C.S.A. §4201.

The Court of Appeals was correct in its conclusion that the state law means what it says; "adequate services" must be provided. 612 F.2d at 100; 122a-123a. The lower court therefore held that "to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." *Id.* at 102; 127a.[19]

The Court of Appeals held that every right and corresponding item of relief based in the federal statute is also part and parcel of the state statute.

1. *Individual needs must be addressed under state law:*

> The state statute, like the federal statute, was focused on *individual* needs. Since the statutory

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19. Under Pennsylvania law, "facilities" is a broad term including both large isolated institutions and a variety of smaller community programs. " 'Facility' means any mental health establishment, hospital, clinic, institution, center, day care center or other organizational unit, or part thereof, which is devoted primarily to the diagnosis, treatment, care, rehabilitation or detention of mentally disabled persons." 50 Pa.C.S.A. §4102.

> rights to treatment, state and federal, vindicate the individual patient's fundamental interest in personal liberty, it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated.

612 F.2d at 115; 157a (emphasis in original).

2. *Non-institutional care is favored under state law:*

> However, we have recognized that although institutionalization is strongly disfavored, it is not foreclosed by the governing federal and state statutes. It is conceivable that in processing a given future application, a Base Service Unit will find that no available CLA is suitable for the individual, life in the community is not possible and no other alternative institution in the relevant geographic area is available.

612 F.2d at 115-116; 159a.

3. *Provision of habilitation in community settings can be imposed under state law.*

> The Counties contend, however, that while they may have *some* responsibilities under the Act to provide habilitation to the retarded, those responsibilities are exhaustively specified in section 301(d), and no other duties — such as habilitation at institutions or community living arrangements — can be imposed on them. We reject this suggestion.

612 F.2d at 103; 128a-129a (emphasis in original, footnote omitted).

4. *Dramatic institutional improvements are required under state law.*

> [S]tate and federal laws plainly require that if Pennhurst is to remain open for at least some pa-

> tients, it must be dramatically improved so as to provide adequate habilitation.

612 F.2d at 116; 160a.

C. State Law Requires Affirmance of the Judgment Below

Without exception, decisions of Pennsylvania courts, state and federal, support the statutory analysis of the Pennsylvania mental health and retardation act adopted by the Court of Appeals.

For all plaintiff class members, the case law and state regulations mirror the decision below and, with astonishing clarity, set forth identical rights and remedies:

1. *For people currently in Pennhurst.* The Commonwealth Court of Pennsylvania, a court of state-wide jurisdiction and, in this context, the intermediate appellate court, has adopted the "right to habilitation in the least restrictive alternative" doctrine of the court below and another federal court which also found the right in the statute:

> In *Eubanks v. Clarke*, 434 F.Supp. 1022 (E.D. Pa. 1977). the court held that where a state has facilities for the mentally ill which differ significantly in the amount of restrictions on the rights and liberties of the patients, due process requires that the state place individuals in the least restrictive setting consistent with legitimate safety, care and treatment objectives.***
>
> The only justifiable purpose for commitment of the retarded is habilitation and when the state involuntarily commits retarded persons it must provide "minimally adequate habilitation." *Halderman v. Pennhurst State School*, 446 F.Supp. 1295 (E.D. Pa. 1977).

In re Guzan, 405 A.2d 1036 (Pa. Comwlth. 1979).[20] In decision after decision, the Pennsylvania state courts mandate the provision of appropriate services, in the community if indicated, for retarded persons.[21]

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20. *Guzan* involved a request for a transfer of a retarded person from a facility in the community to a state institution called Western Center. The court approved the transfer and held that, as soon as institutional care was no longer necessary, the person should be discharged. In like manner, the Court of Appeals here has approved only necessary institutional care for the purpose of habilitation. An August 1, 1980, decision of the Superior Court describes "the express policy" of state mental health laws" as "favoring lesser over greater instrusions upon a patient's liberty." *In re: Commitment of Ann S.*, ____ Pa. Super. ____ (August 1, 1980).

21. *See e.g., In re: Joyce Z.*, 123 Pitt L.J. 181 (Allegheny Cty. 1975); *In the Matter of Anthony S.*, N. DP 1521-75-11 J 198159 (May 16, 1977), Philadelphia Cty. Juvenile Court); *In the Interest of Angelo P.*, No. J. 194137 (December 6, 1976, Philadelphia Cty.); *In the Interest of Stephanie Lamb*, No. J-184929 (June 30, 1977, Philadelphia Cty.); *In the Interest of Marie O'Hara*, No. 248 Dec. Term, 1976 (April 7, 1977), Philadelphia Cty.); *In the Interest of Edwin Ward*, Nov. Term, 1977 (February 23, 1978 and March 6, 1979, Philadelphia Cty.); *In the Matter of Benjamin Jefferson*, No. 096177, 083977 (November 28, 1978, Chester County); *In the Interest of Moises Santiago*, No. 41-CS-1978 (Chester County; *In the Interest of Mary Alice S.*, No. 75-11919 (April 13, 1976, Delaware Cty.), *In the Interest of Anthony Hariss*, No. 17034 (April 27, 1976, Delaware Cty.); *In the Interest of Carvella Ebron*, No. J-181877 (March 19, 1979, Philadelphia Cty.); *In re Joseph Schmidt*, No. CC660 (February 13, 1979, Allegheny Cty. Orphans Court); *In the Interest of Kenneth P.*, No. J-204067 (March 6, 1979, Philadelphia Cty.).

The Pennsylvania Commonwealth Court, a statewide court, has recognized that state law requires the availability of adequate retardation facilities. *County of Allegheny v. Commw. Dept. of Public Welfare*, 33 Pa. Commw. Ct. 267, 269, 381 A.2d 1014, 1016 (1978). *See Hoolick v. Retreat State Hospital*, 24 Pa. Commw. Ct. 218, 354 A.2d 609 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978). A federal court has found a state statutory right to treatment or release. *Eubanks v. Clarke*, 434 F.Supp. 1022 (E.D. Pa. 1977) (*per* Chief Judge Lord).

2. *For potential future commitments*. Since 1971, and continuing until today, no "voluntary" admissions or commitments to Pennhurst have been permitted by the institution.[22] No involuntary commitment to Pennhurst occurs without a judicial determination that the person's needs cannot be satisfied through development of a community program. State regulations adopted in the wake of a federal court order so require.[23]

No basis for reversal of the judgment on state law grounds has been submitted by petitioners; their three bold arguments collapse upon review:

> 1. It is argued that "the responsibility to provide services is limited, as it must be, by the availability of appropriate funds." Brief for Petitioners at 40. The Court of Appeals, of course, recognized this "apparent truism," and noted state law procedures for reallocating costs of services "in the event sufficient funds have not been appropriated." 612 F.2d at 102; 126a. 50 Pa.C.S.A. §§508 and 509 (5). This extraordinary procedure's application would recognize, as did the court below, that "no right is without some limitations." 612 F.2d at 102; 127a. The contours in that hypothetical circumstance of any state law limitations were not before the lower court.

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22. The purpose of such "voluntary" institutionalization, should it be permitted at Pennhurst, is habilitation: "The Mental Health and Mental Retardation Act of 1966 regulates the voluntary admission for inpatient hospital habilitation of the mentally retarded." *Secretary of Public Welfare v. Institutionalized Juveniles*, 422 U.S. 640, 658 (1979).

23. *Goldy v. Beal*, 429 F.Supp. 640 (M.D. Pa. 1976), invalidated the state civil commitment statute and the state was without a mechanism for commitment of the retarded. To permit the legislature to consider the question, a stay was ordered by consent on October 28, 1976 and its provisions adopted and published as state regulations. 6 Pa. Bull. 2883 (Nov. 13, 1976).

2. It is argued that "treatment is not the only basis for commitment of the retarded under state law. To the contrary, the mentally retarded may be committed when they are 'in need of care or treatment.' Pa. Stat. Ann. Tit. 50, §§4406(a)." Brief for Petitioners at 42. *This statutory standard was ruled unconstitutional in 1976 and its use enjoined by a three-judge court in Goldy v. Beal, 429 F.Supp. 640 (M.D. Pa. 1976). No retarded person may be institutionalized in Pennsylvania except under procedures mandated in Goldy which necessitate a finding of dangerousness and, in addition, a finding that no community facility "can be made available."* Order of October 28, 1976, *Goldy v. Beal, supra; see* note 23 *supra*. Therefore, petitioners' second argument, founded on a non-existent statutory provision, falls.

3. County petitioners argue they have no responsibility for community programs because they are not specified in 50 Pa.C.S.A. §4301(d). Brief for Petitioners at 42. This argument ignores both the facts and other dispositive sections of the state law. Every county *must* establish a county retardation program, §4301(a), and that program is specifically granted the power to establish any "other service or program designed to prevent mental disability or the necessity of admitting or committing the mentally disabled to a facility." §4301(f). The mandated services which the petitioners concede are county duties include several which are the basis for community programs (*e.g.*, aftercare, specialized rehabilitative and training services, partial hospitalization). Beyond the statutes' interstices are the facts of this case and the counties' direct involvement. Notes 97a and 106a *infra*.

With a state law ground which is independent and sufficient in every respect, and which is articulated in

opinions below which are entirely reasonable, the judgment below must be affirmed.

III. In the Developmentally Disabled Assistance and Bill of Rights Act, Congress established rights including the right to individually determined habilitation in the appropriate least restrictive setting.

Initial Congressional reaction to overcrowed, obsolete facilities providing inappropriate services to the retarded was legislation beginning in 1963 providing financial aid to the states for construction and grants which simply encouraged community services. This approach did not work, Congress found, and after several years of intense study, many hearings and consideration of alternative legislative initiatives, Congress understood that the conditions under which retarded people are generally confined in institutions render impossible the fulfillment of the habilitation standard established as national policy. Therefore, in 1975, Congress departed from the existing laws' sole emphasis on funding and recognized specific rights. They enacted a Bill of Rights explicitly intended to eliminate the inappropriate institutional care to which Congress found a "vast majority of the developmentally disabled" were being subjected. With strengthened provisions in 1978, this consummate equal rights initiative, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*, is the federal statutory ground on which the Court of Appeals rested its judgment.

Title II of the Act, the "Bill of Rights" section, sets the standard by which equality is measured and enforced — the standard is provision of individually determined services in an appropriate setting — while Title I, the "Assistance" section, adopts a mechanism permitting states to draw upon other existing federal programs to meet the statutory obligations. Petitioners'

confusion of these separate provisions brutalizes both the plain meaning of the Act and its legislative history.

The discussion below begins with an analysis of the words of the statute. This is followed by a summary of the statutory predecessors to the current Act, a procedural history of the Bill of Rights provisions, and, finally, an analysis of the intent of Congress expressed in several years of legislative history.

A. The Plain Meaning of the Act Supports the Judgment Below.

It is axiomatic that statutory interpretation starts with the plain language of an enactment:

> What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with — to read English intelligently — and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.[24]

Where "Congress was aware of what it was doing and the legislative history does not demonstrate that the plain language was not intended," *Maine v. Thiboutot*,

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24. *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting).

____ U.S. ____ (1980), the usual meaning of a statute's words controls. *Mobil Alaska Pipeline Co. v. United States*, 436 U.S. 631 (1978). In such a case, this Court does not revisit the social policy questions determined by Congress. "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).[25]

Two purposes are evident in the title of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.*[26] First, to *assist* the developmentally disabled and, second, to provide the beneficiaries of the Act with a *Bill of Rights*.[27]

"Bill of Rights" are words with ringing import in our history; the phrase was familiar to those who settled in America. *See English Bill of Rights*, 1 Wm. & M., sess. 2, c. 2 (1689). By 1784, seven states had adopted discrete declarations or bills of rights and four others had singled out specific rights for incorporation into their constitutions.[28] A price for ratification of the Constitution was the new states' resolve to adopt a Bill of Rights, a task

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25. *See Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 301-302 (1943); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 187-188 (1944).

26. "Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." *Fisher v. Blight*, 6 U.S. 358 (1805) (*per* Marshall, Ch.J.). *Accord, United States v. Katz*, 271 U.S. 354, 357 (1926).

27. The title was not adopted casually. Three years after its enactment, Congress explicitly rejected an attempt to drop "Bill of Rights" and rename the law "Developmental Disabilities Act." 1978 U.S. Code Cong. & Admin. News 7415 (Conference Committee).

28. The seven states are Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania and Virginia; the four are Georgia, New Jersey, New York and South Carolina. *See* Thorpe, *Constitutions and Charters*.

accomplished in the First Session of Congress which approved the Bill of Rights on September 26, 1789. *Senate Journal*, 1st Sess. 150-151. *See*, Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, Ch. X, "Unfinished Business — The Bill of Rights" at 413-456 (1971).

It is the "numinous aura of the Bill of Rights," Goebel, *History, supra*, at 457, which is evoked by the title and provisions of the Act under consideration. Petitioners cite no evidence, and there is none, to indicate that Congress' choice of words was accidental, trivial or meaningless.

A "Bill of Rights" establishes rights;[29] the Act's various provisions identifying specific "rights" cannot reasonably be understood to refer to anything but rights.

B. The Statutory Predecessors of the Current Act

President John F. Kennedy initiated federal action to assist the mentally retarded with his establishment of the first President's Panel on Mental Retardation in the early 1960's.[30] Legislative response to the work of this commission was swift. The Congress found that comprehensive services to retarded citizens were needed and that existing facilities were overcrowded, obsolete and inappropriate[31] and enacted the Mental Retardation

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29. Congress headed Title II, "Establishment and Protection of the Rights of Persons with Developmental Disabilities." 89 Stat. 502. *See* 124 Cong. Rec. S2519 (Sen. Randolph), S15557 (Sen. Stafford), S15562 (Sen. Williams); notes 55-57, 59 *infra*.

30. *See* The President's Panel on Mental Retardation, *Report of the Task Force on Law* 10-12, 41 (1963).

31. H.Rep. No. 694, reprinted in 1963 U.S. Code Cong. & Ad. News 1054, 1061-1062. Preference for community services was apparent:

> Sheltered workshops can be of great assistance as a part of a comprehensive center organized to restore the mentally retarded to the maximum degree of normal living in his community. In the absence of a coordinated program of services, the mentally retarded person is denied the opportunity to develop most fully his potential for contributing to our society.

Id at 1061.

Facilities and Community Mental Health Centers Construction Act of 1963, P.L. 88-164, 77 Stat. 282 (1963), to provide funds for construction of new facilities and for the development of community facilities.

The 1963 Act was revised and extended by the Mental Retardation Act of 1967 which added a grant program to train professionals in community retardation programs to avoid institutionalization and continued fiscal support of community programs and comprehensive services for the retarded.[32]

A 1970 law introduced the formula grant system still in use under the present Act and expanded the scope of the law to include as beneficiaries the developmental disabilities (mental retardation, epilepsy, cerebral palsy and autism). Developmental Disabilities Services and Facilities Construction Amendments of 1970.[33]

Adding an entirely new dimension to the existing funding statute, the Bill of Rights was enacted in 1975 in the Developmentally Disabled Assistance and Bill of Rights Act[34] which, with its 1978 amendments,[35] is discussed below.

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32. The developmental potential of the retarded was noted:

> The mentally retarded can be educated to be useful citizens, self-supporting and free of institutional care. . . . Our aid to the mentally retarded can mean the difference between their being a whole human person and being an impersonal statistic in an institution.

1967 U.S. Code, Cong. & Ad. News 2071. *See also*, Mental Retardation Amendments of 1967, Hearing Before the Subcommittee on Health of the Committee on Labor and Public Welfare, U.S. Senate, on S.1099 and H.R. 643 and S.389; Mental Retardation and Other Developmental Disabilities, 1969, Hearings Before the Subcommittee on Health of the Committee on Labor and Public Welfare, U.S. Senate, on S.2846. The 1967 statute is at P.L. 90-170, 81 Stat. 527, extended, P.L. 91-517, 84 Stat. 1316.

33. P.L. 91-517, 84 Stat. 1316 (1970).

34. P.L. 94-103, 89 Stat. 502 (1975).

35. Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Title V, P.L. 95-602, 92 Stat. 2955 (1978).

C. Procedural History of the Bill of Rights

A decade after enactment of the Mental Retardation Facilities and Community Mental Health Centers Act of 1963, the Bill of Rights was presented to the Senate as S.458, a Bill of Rights for the mentally retarded.[137] The country had been shaken by media exposure of conditions at Willowbrook and other institutions and the bill's sponsor, Sen. Jacob Javits, responded with this proposed legislation to insure habilitation by establishment of standards for residential facilities and minimizing inappropriate admissions to institutions such as the one in his home state of New York. 1973 Hearings, cited *infra* note 36, at 229-230; 121 Cong. Rec. 29820 (Sen. Javits); Developmentally Disabled Assistance and Bill of Rights Act, 1974, Hearings Before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.3378 at 273 (Sen. Kennedy) (hereafter, 1974 Hearings).

S.458 was followed in 1974 by S.3378 which was substantially equivalent to the prior bill,[37] S. Rep. 94-160 at 3-4, with Congressional interest further provoked by the study by the General Accounting Office, performed under the 1970 Act, which revealed continuing serious gaps in services to the retarded, with disparities among the states and within the states. 1974 Hearings at 1-2; 121 Cong. Rec. 29817 (Sen. Randolph). The bill's purpose continued to be establishment of habilitation

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36. *See* S.Rep. 94-160 at 3-4. S.458 and its grant counterpart S.427 are reprinted in Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973, Hearing Before the Subcommitee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.427 and S.458, (hereafter, 1973 Hearings).

37. S.3378 extended the standards of S.458 to community facilities. 1974 at 273 (Sen. Kennedy). S.3378 is reprinted in the 1974 Hearings.

standards and redirection away from institutionalization.[38]

The parent of the Bill of Rights in its current form is S.462, under which S.3378 was reintroduced in the 1975 legislative season.[39] Like its predecessors, S.462 set forth detailed standards for residential and community programs. As discussed in detail in the next section, following hearings, Senate Report 94-160 issued. Passed by the Senate, S.462 went to the House and the matter was referred to a Joint Committee.[40] The various provisions were distilled into their current form and became law as P.L. 94-103, 89 Stat. 496, Title II.

In 1978, when the planning program of the "assistance" section of the Act, Title I, was substantially revised (although not redirected), the Bill of Rights, Title II, was unchanged, except for Congress' addition of a special emphasis that the rights in the Bill of Rights were in addition to rights possessed by all persons. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, P.L. 95-602, Title II, §507, 92 Stat. 3007 (1978).

D. Congressional Intent to Create Enforceable Rights Is Manifest in the Legislative History of the Act.

The legislative process, including three years of hearings, extensive debate and study of institutions and their alternatives, demonstrates the studied intention with which Congress abandoned a purely encouragement-funding strategy and adopted an enforcement-rights solution.

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38. S.3378, Title II, §201, reprinted 1974 Hearings at 44.

39. S.462 is reprinted in Developmentally Disabled Assistance and Bill of Rights Act, 1975, Hearings Before the Subcommitee on the Handicapped of the Committee on Labor and Public Welfare, U.S. Senate, on S.462 (hereafter, 1975 Hearings).

40. H. Conf. Rep. 94-473, reprinted 1975 U.S. Code & Ad. News 943.

42 U.S.C. §6010, the Bill of Rights, codifies "a right to appropriate treatment, services and habilitation," §6010(1), "designed to maximize the developmental potential of the person," and "provided in the setting that is least restrictive." §6010(2).[41]

"[P]ublic funds" of both the "Federal Government and the States" cannot be provided to institutional or other residential programs which do not meet specific minimum standards. §6010(3). There is no dispute in this case that Pennhurst violates each of the standards in §6010(3).

Parts (1) and (2) of §6010 emphasize the *individual* rights of disabled people and part (3) is focused on the *institution*.

§6010(4) looks to "all programs" (not residential facilities alone) and specifies certain standards. §6010 closes with a pointed reminder that the disabled have other rights in addition to those under the Act.

1. *Congressional Findings*

Every finding of the lower courts is matched by a congruent prior finding of the Congress:

> 1. Mental retardation is an educational handicap, not a disease; retarded people are not subhuman, objects of pity, eugenic misfits or eternal children. S. Rep. 94-160 at 27-28; 446 F.Supp. at 1298; 10a-13a.
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> 2. In the history of the retarded, misconceptions and myths resulted in segregation, sterilization, stigmatization and institutionalization of retarded people. S. Rep. 94-160 at 26-27; 1973 Hearings at 253; 446 F.Supp. 1299-1300; 11a-13a.
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> 3. Congress adopted the developmental model of services to retarded people, finding that, with

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41. Reprinted at Petition for Certiorari of Pennhurst Parents-Staff Association at 182-183a of the Appendix therein.

proper habilitation, every retarded person is capable of growth toward the goal of self-sufficiency; therefore custodial care "must be rejected." S. Rep. 94-160 at 28;[42] 446 F.Supp. at 1298; 10a.

4. Despite a decade of federal funding for institutions, deplorable conditions and scandals prompting litigation continued to affect such facilities; dramatic changes were required. S. Rep. 94-160 at 3, 28; 446 F.Supp. at 1314-1322; 48a-66a.[43]

5. Persons forced to vegetate on wards of institutions become further physically and mentally handicapped. S. Rep. 94-160 at 28; 1973 Hearings at 229-230; 446 F.Supp. at 1304-1310; 34a-40a.

6. State officials conceded that inhumane and non-habilitative conditions plague institutions. S.

42.

> Such a view stresses that all developmentally disabled individuals have potential for learning and growth.
>
> From this developmental model, it follows that custodial care — which is predicated on the assumption that certain individuals are essentially incapable of development — must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.

S. Rep. 94-160 at 28. *See* 1967 U.S. Code & Ad. News 2071; 124 Cong. Rec. 15562 (Sen. Williams); 124 Cong. Rec. S15571 (Sen. Dole).

43.

> The past four years have seen a dramatic increase in public awareness of the needs of institutionalized mentally retarded or developmentally disabled persons. This has been highlighted by scandals in a number of institutions, by court cases, and by some excellent work in the mass media. Testimony before this Committee persuasively demonstrated that implementation and enforcement of minimum standards of care in institutions for the developmentally disabled are urgently needed and that the Federal Government can and should play a significant role in upgrading the care and services provided to developmentally disabled persons in public and other facilities which operate with Federal funds.

S. Rep. 94-160 at 3.

Rep. 94-160 at 32; 446 F.Supp. at 1313; 47a; 612 F.2d at 92; 103a.[44]

7. Institutions do not provide habilitation. S. Rep. 94-160 at 16, 28, 30, 32-33 (". . . it is not, however, the Committee's intent that enactment of this title should be construed in any way to constitute support of institutionalization of the mentally retarded." *Id.* at 33); 446 F.Supp. at 1318; 58a.[45]

8. Institutions are dangerous. 1973 Hearings at 567 (Sen. Kennedy); S. Rep. 94-160 at 28 (contractures), 30 (drugs); 446 F.Supp. at 1304-1310; 34a-40a.

9. "Most of the institutions themselves are anachronisms, and . . . rapid steps should be taken to phase them out." S. Rep. 94-160 at 32-33; 1973 Hearings at 253; 446 F.Supp. at 1318; 58-59a.[46]

44.

> The inhumane and nonhabilitation aspects of these large institutions have unfortunately been graphically demonstrated over and over again. In a number of crucial court cases, for example, the defendants were only too willing to stipulate that the conditions described by the plaintiffs were accurate.

S. Rep. 94-160 at 32.

45.

> . . . most large institutions for the mentally retarded and developmentally disabled in the United States lack individualized treatment plans and programs. That is, care is primarily custodial; and little attention is paid to the residents' potential for increased self-care, ability to use education and training.

S. Rep. 94-160 at 30. Institutions "lack any commitment to change and have not accepted the developmental model described above." *Id.* at 28.

46.

> Efforts to assure people treatment, education and habilitation services in large institutions should not deflect attention from the fact that most of the institutions themselves are anachronisms, and that rapid steps should be taken to phase them out. Many of these institutions by their very nature, their size, their isolation, their impersonality, are unsuited for treatment, education and habilitation programs.

10. Reducing institutional population is not sufficient; creation of community services is the necessary remedy. S. Rep. 94-160 at 30; 121 Cong. Rec. 16516 (Sen. Williams); 1973 Hearings at 563; 121 Cong. Rec. 9965 (Rep. Young); 121 Cong. Rec. 9977 (Rep. Carter); 446 F.Supp. at 1312; 43a.[47]

11. The "vast majority of persons now institutionalized should not be in these institutions at all," S. Rep. 94-160 at 33, and those people require individual determinations of what they need. 1973 Hearings at 254, 563; H. Conf. Rep. 94-473 at 32-33, reprinted 1975 U.S. Code & Ad. News 943, 952; S. Rep. 94-160 at 30; 121 Cong. Rec. 9977 (Rep. Carter); 446 F.Supp. at 1311-1312; 43a; 612 F.2d at 115; 156a-159a.

12. Normalization is integral to habilitation for retarded people and it must occur, by definition, in the least restrictive environment appropriate to the individual. Thus, habilitation includes the "least restrictive" requirement. S. Rep. 94-160 at 28; 1973 Hearings at 564; 446 F.Supp. at 1318; 58a; 612 F.2d at 93; 105a.[48]

NOTE 46 — *(Continued)*

S. Rep. 94-160 at 32-33. "Many of the institutions can best be described as 'hopeless places' dedicated to custodial care of life-long residents." *Id.* at 28.

47. Congressional support for community services for severely handicapped people was reaffirmed in its funding of centers for independent living under the 1978 amendments to the Rehabilitation Act. P.L. 95-602, cited noted 35 *supra*.

48.

> A final, but critically important dimension of this new model is that developmentally disabled persons should live like non-developmentally disabled persons to the greatest extent possible. Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives. From this it also follows that each developmentally disabled person should be allowed to live in the least restrictive environment conducive to his or her maximum development.

S. Rep. 94-160 at 28.

13. Aware of the unnecessary expense of institutions, particularly where no habilitation is provided,[49] Congress expected the states to further develop alternatives for the disabled,[50] and Congress also expected that development of community services, and the use of hundreds of millions of dollars from other federal programs,[51] would free more state dollars for community care.[52] It is of no import that the Bill of Rights itself does not fully fund the rights created thereby; the explicit intention was to

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49. 124 Cong. Rec. S15661 (Sen. Muskie); 121 Cong. Rec. 9978 (Sen. Biaggi); 1973 Hearings at 254, 565; 124 Cong. Rec. S18996 (Sen. Randolph).

50. S. Rep. 94-160 at 33. The extensive planning required of states under the funding provisions would be meaningless without state support of the services planned. *E.g.*, §6063(a)(20) (plan to eliminate institutional placements); §6063(a)(21) (programs for infants and preschool children); §6063(a)(23) (support for community programs). More specific means of securing state action were included in the 1978 amendments for the purpose of increasing the impact of federal dollars on the state system. H. Rep. 95-1188 at 9-10. *See*, the §6000(a)(5) (". . . it is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care . . ."); §§6063(b) and 6001(8) (priority services exclude institutional care).

51. $800,000,000 in federal funds assisted the developmentally disabled in 1974. 1974 Hearings at 275. Institutions for the retarded received $490,000,000 that year. *Id.* at 291. *See* note 52 *infra*.

52.

> It is hoped that corresponding amounts of State and other funds currently being spent on institutional care will be rebudgeted for community care, an obvious rebudgeting which has not always occurred in conjunction with deinstitutionalization efforts.

H. Rep. 94-58 at 10. Congress provided funding supplemental to that of the states, *see Harris v. McRae*, 48 U.S.L.W. 4941, 4944 (1980), to assist in enforcement of the Bill of Rights. Having found that developmentally disabled persons were often excluded from funding programs, H. Rep. 95-1188 at 7; S. Rep. 94-160 at 26-28;

lever the already available funds. Notes 150, 151, 152, and 153 *infra*.[53]

14. Institutionalization is permitted only where "absolutely necessary," S. Rep. 94-160 at 16, and where the institution is one which can meet the needs of the proposed resident. *Id.* at 1, 33; 121 Cong. Rec. 16520 (Sen. Javits).[54]

2. *Congress Intended to Codify Those Civil Rights Established By the Courts.*

As it considered passage of the Bill of Rights Act, Congress knew that institutional conditions remained

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NOTE 52 — *(Continued)*

42 U.S.C. §6000(a)(4), Congress created an interstitial program to fill the gaps between federal programs. H. Rep. 95-1188, reprinted, 1978 U.S. Code Cong. & Ad. News at 7543; §§6063(b)(2)(B) and §6066; 124 Cong. Rec. H9986. ("Actually most of the funds from this program are not to be spent on direct services payment. Instead they are used to provide access and 'tap into' existing programs to improve their ability to serve the 'D.D.' population."; 121 Cong. Rec. 29820 (Sen. Schweiker). HEW's expenditures for retardation in 1975 were $1,531,000,000. Comptroller General, Report to the Congress, *Returning the Mentally Disabled to the Community: Government Needs to Do More* 231 (1977). For fiscal 1980, HEW's retardation expenditures were more than $3,000,000,000. HEW, *Special Report: Mental Retardation*, Hearings before the Subcommittee on Departments of Labor, HEW and Related Agencies of the House Committee on Appropriations, 96th Cong., 2d Sess., Part 2, at 641-44, 673. *See* note 51. Introducing the 1978 amendments, Sen. Stafford declared, "There should be no cost limits on helping handicapped individuals to live free in a democratic society." 124 Cong. Rec. S2521.

53. For Pennhurst, where sufficient funds are available under state law, there can be no reason to avoid or delay effectuation of Congressional intent.

54. *See* 121 Cong. Rec. 16470, 16516-16517 (Sen. Williams); 121 Cong. Rec. 16552 (Sen. Beall); *Id.* (Sen. Schweiker) 121 Cong. Rec. 16520 (Sen. Cranston) ("where institutional programs are appropriate . . . habilitation programs can be given residential patients to develop their fully potential.")

abominable, 1973 Hearings at 562-563, and that "[e]ncouraging, but limited progress ha[d] been made under the present law." S. Rep. 94-160 at 2 (P.L. 90-170). Congress decided to strengthen the existing law, 121 Cong. Rec. 29821 (Sen. Williams), by establishing a statutory right to habilitation, following the lead of the federal courts:[55]

> Title II is designed to assist in the protection of the human rights guaranteed under the Constitution of those mentally retarded and other developmentally disabled individuals who require institutional care or need community facilities and programs.

S. Rep. 94-160 at 34.

After passage by the Senate, the Bill of Rights finally emerged from the Joint Conference Committee in its present distilled form.[56] Title II, headed "Establish-

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55. S. Rep. 94-160 at 2-3, 30-33; 121 Cong. Rec. 16515 (Sen. Randolph); *id.* at 16516 (Sen. Stafford), 16516-16517 (Sen. Williams), 16519 (Sen. Javits), 16522 (Sen. Beall), and 16522 (Sen. Taft); 1973 Hearings at 250. S. 462's standards, later condensed into §6010, were the "absolute minimum" so as not to "violate the Constitutional rights of the individuals in those programs." S. Rep. 94-160 at 38 ("violation of their human and civil rights"). Note 29 *supra*.

56. H.Conf. Rep. 94-473, reprinted, 1975 U.S. Code Cong. & Ad. News 943 (1975).

The Conference Committee's "more general, yet equally forceful, Bill of Rights," 612 F.2d at 97; 113a, was not, as petitioners assert, in derogation of the rights to habilitation. It was, rather, a response to concerns of the Department of Health, Education and Welfare and others that the detailed inflexible standards of S. 3378 (the 1974 predecessor to S. 462) would interfere with the ICF/MR certification of facilities and, more importantly, would unwisely shift attention to the *institution*, rather than to the *individual* requiring services. 1974 Hearings at 285, 288-289, 292 (HEW Assistant Secretary), 389-390 (National Association for Retarded Citizens), and 407 (United Cerebral Palsy Association); 1973 Hearings

ment and Protection of the Rights of Persons with Developmental Disabilities," opens with Section 111, 42 U.S.C. §6010, "Rights of the Developmentally Disabled." 89 Stat. 502. The intention had not altered a whit; Congress was determined to codify the right to habilitation. *E.g.*, 121 Cong. Rec. 16510-16520 (Sen. Javits); 121 Cong. Rec. 29309 (rep. Rogers); H. Conf. Rep. 94-473, at 41, 42, reprinted 1975 U.S. Code Cong. & Ad. News 943, 961, 962.[57]

That enforceable rights were established is apparent in the consideration of the 1978 amendments:

> As lawmakers and as citizens we must help protect the rights of these severely and profoundly handicapped persons. Equity for severely handicapped individuals is essential to our national security. . . . Our work on this measure affirms not only the rights of these severely handicapped individuals but also strengthens the rights and protection of all citizens.

124 Cong. Rec. 15547 (Sen. Randolph).

The Bill of Rights Act also required creation of an independent system for "Protection and Advocacy of In-

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NOTE 56 — *(Continued)*
at 556 (Sen. Kennedy), 1975 Hearings at 434, 437 (HEW). Section 6010 acknowledges the difference between an outcome measurement for individuals (the right to habilitation) and institutional standards.

57. "These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by Congress and the courts." H. Conf. Rep., *supra* note 56, at 42. "The conference substitute contains a compromise which specifies *rights*. . . ." *Id.* at 41 (emphasis added). *See* 121 Cong. Rec. 29818 (Sen. Randolph); 121 Cong. Rec. 29821 (Sen. Williams). Note 29 *supra*.

dividual Rights," 42 U.S.C. §6012, Title II, §203, 89 Stat. 504, with authority to pursue "legal . . . remedies" to protect "rights" of persons receiving "habilitation." Surely Congress was here guaranteeing that the rights it established would not be written in air and that severely disabled people who are sometimes limited in ability to advocate on their own behalf would have an effective voice.

IV. A judicial remedy is provided to developmentally disabled people for official deprivation of rights under the Developmentally Disabled Assistance and Bill of Rights Act.

Developmentally disabled people may assert their rights, and federal courts may provide a remedy, under either 42 U.S.C. §1983 or an implied private right of action. Both these alternatives are available to effectuate the Congressional intention that people such as those confined at the Pennhurst institution have their day in court.

A. Remedy under 42 U.S.C. §1983

In a case over which a court has jurisdiction,[58] 42 U.S.C. §1983 provides a remedy for official deprivation of federal statutory rights. *Maine v. Thiboutot*, ____ U.S. ____ (1980). The Bill of Rights Act establishes substantive rights to individualized habilitative services, §6010(1), and to an appropriate habilitative environment, §6010(2). The power of Congress to establish such rights is not disputed by petitioners, although they deny Congress' intention to do so. That power, however,

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58. Jurisdiction is not disputed by petitioners. The private plaintiffs raised substantial constitutional and pendent state claims, *Hagans v. Levine*, 415, 528, 536, 543 (1974); 28 U.S.C. §1343(3), and damage claims, 28 U.S.C. §1331.

is clear and stems from two alternative sources, Congress' Section 5 and its spending power.

Legislation enacted pursuant to Section 5 of the Fourteenth Amendment may impose severe restraints on state action and discretion. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), with the Court giving great deference to Congressional findings that particular steps are "appropriate" exercises of legislative authority. *Regents of University of California v. Bakke*, 438 U.S. 265, 302 n. 41 (1979) (collecting cases); *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Congress intended the Bill of Rights Act to enforce the Fourteenth Amendment.[59]

Rights violated at Pennhurst and encompassed in the Act include those to receive more than zero education, *Rodriguez v. San Antonio School District*, 411 U.S. 1 (1973), personal security, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), institutionalization the nature and duration of which bear a reasonable relation to its purpose, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), freedom from custodial care for non-dangerous persons capable of living safely with assistance outside the institution, *O'Connor v. Donaldson*, 422 U.S. 567, 576 (1975), and freedom from training and education in separate stigmatizing and unequal facilities, *Brown v. Board of Education*, 356 U.S. 148 (1954).

Having accepted federal funds under the Bill of Rights Act for its unified state-county retardation program, Pennsylvania must comply with the requirements imposed by Congress under its spending clause powers.

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59. 612 F.2d at 98 n. 17; 117a n.17; notes 29, 55-57 *supra*; S.Rep. 94-160 at 32; H.R. Rep. 95-1188 at 7; H.R. Conf. Rep. 94-473 at 42, reprinted, 1975 U.S. Code, Cong. & Ad. News 943, 961. The legislation was prompted by the conditions of the disabled and judicial recognition of their constitutional rights; the Bill of Rights was intended to codify and implement such rights. *See Oregon v. Mitchell*, 400 U.S. 112 (1970).

612 F.2d at 98-99 n. 20, 21; 118a-119a n. 20, 21; *Helvering v. Davis*, 301 U.S. 619 (1937); *Rosado v. Wyman*, 397 U.S. 397 (1970). *Cf., National League of Cities v. Usery*, 426 U.S. 833, 853 n. 17 (1976); *Miller v. Youakim*, 440 U.S. 125 (1979).

Petitioners grasp at straws when they inject in their briefs a question on which certiorari was not granted: whether the Bill of Rights Act can be enforced exclusively by a federal funding cut-off by the Secretary of Health and Human Services on her own or under court order. The "power to cut off federal funds for noncompliance with statutory requirements," a power resting with federal departments under every federal-state cooperative program, has repeatedly been "considered and rejected" by the Court as a basis upon which to deny judicial power to review state action. *Rosado v. Wyman*, 397 U.S. 397, 420 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).[60] Congress intended the Bill of Rights Act to support and encourage legal action by disabled people themselves.[61] A system was established to protect and advocate the rights of

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60. *See Regents of University of California v. Bakke*, 438 U.S. 265, 419 n. 26 (1979) (opinion of Stevens, J.); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 672 (1972) (White, J., concurring).

61. Notes 29, 43 *supra*. Congress fully expected judicial enforcement of §6010, declaring that "this right should be protected and assured by Congress and the courts." H. Conf. Rep. 94-473 at 42, reprinted, 1975 U.S. Code, Cong. & Ad. News 943, 961. Congress was aware and approved of institutional disability litigation, S. Rep. 94-160 at 34, and knew that "all indications point toward little change unless substantial legal and advocacy pressure is forthcoming." 121 Cong. Rec. 16516 (Sen. Williams, citing litigation).

> Mr. President, this is a program which I think is strongly needed. I do not know how many times we have had television documentaries on Willowbrook, and Forest Haven, and other institutions in this Nation, and still nothing gets done. The public looks at these various programs and they absolutely deplore the conditions that, in too many instances, have been the lot of the people that are covered by this legislation.

disabled people through pursuit of legal remedies,[62] and, in 1978, Congress amended §6010 to express that the rights there specified "are in addition to any constitutional or other rights afforded to all persons."[63] There being no word or phrase in the legislation or history even hinting at an intention to lodge exclusive enforcement in a funding cut-off remedy, it cannot be concluded that "Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." *Rosado v. Wyman*, 397 U.S. at 420.[64]

NOTE 61 — *(Continued)*

> Everyone in here knows that the only way that change is going to be brought about is the long difficult, persistent and dedicated advocacy of those who are prepared to follow through administrative hearings, through hearings on regulations, through challenges in the courts, for the kinds of rights which are being guaranteed in this legislation. That is the way it is done.

124 Cong. Rec. S15662-S15663 (Sen. Kennedy).

62. 42 U.S.C. §6012. "Let us remember that the current developmentally disabled population totals over 2 million very severely handicapped individuals, most of whom cannot effectively communicate their needs or even realize that their basic rights are being violated." 124 Cong. Rec. S15663 (Sen. Kennedy).

63. H. Rep. 95-1188 at 7, reprinted, 1978 U.S. Code, Cong. & Ad. News 7373. An intent of the Act is "to secure and protect their legal and human rights." *Id.* at 7362.

64. Congressional concern for "the inhuman way we care for such persons," 121 Cong. Rec. 16516 (Sen. Williams), was elevated because so little had changed. "The shocking conditions at Willowbrook in New York, and many other institutions for the mentally retarded throughout the Nation which inspired the bill of rights have not ended." 121 Cong. Rec. 16518 (Sen. Javits). The drastic last-resort funding cut-off remedy, accomplished in a process not admitting the disabled as parties of right, cannot in any event secure habilitative services to which people are entitled. These personal rights are secured not through shutting down programs which transgress the law but by injunctive relief to end the violation itself. *Cannon v. University of Chicago, supra; Regents of University of California v. Bakke, supra; Lau v. Nichols*, 414 U.S. 563 (1974); *Hills v. Gautreaux*, 425 U.S. 284 (1976).

The Secretary's authority to cut off program funds can be exercised only in the extreme circumstance where an entire program fails; that authority is an insufficiently delicate instrument to vindicate particular individuals' personal rights. And it is personal rights which are the concern of §§6010(1) and (2). No provisions of the Bill of Rights Act spotlight individual rights with greater intensity than §§6010(1) and (2) which, by their terms, apply to all "persons with developmental disabilities." By contrast, §6010(3) looks to "institutions" and "programs" and sets standards Congress knew to fall short of the §§6010(1) and (2) individual rights:

> The Conference Committee recognizes that the six minimum standards [§6010(3)] are designed to protect the basic human needs of developmentally disabled individuals and *will not in themselves ensure quality habilitation and adequate programs.*

H. Conf. Rep. 94-473 at 43 (emphasis supplied).[65]

B. Private Right of Action

An independent though consistent alternative to §1983 which provides a judicial remedy for respondents is their implied private right of action under the Bill of Rights Act itself. The question is "one of statutory construction" and the Court's "task is limited solely to determining whether Congress intended to create the private right of action asserted. . . ." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

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65. *E.g., Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969) ("The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."). *Cannon v. University of Chicago, supra*, 441 U.S. at 710, 706 n. 41. As in *Allen*, it is here "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits." 393 U.S. at 557 n. 23.

Cases finding implied private remedies have set forth indicia for taking the measure of statutes. A private remedy is implied where "the statute in question at least prohibited certain conduct or created federal rights in private parties"[66] but not implied where the duties of defendants are "for the benefit of the public at large"[67] or some party other than the plaintiff.[68] A private remedy is implied where it "make[s] effective the congressional purpose"[69] but not implied where Congress has selected other specific exclusive enforcement machinery.[70] A remedy is implied where the right will thereby be enforced[71] but not where no enforcement will result.[72] Finally, a remedy is implied "for the enforcement of civil rights, even when Congress has spoken in purely declarative terms."[73]

The Bill of Rights Act passes muster under these criteria. It is a civil rights law enacted to benefit a particular class and a private action will generate enforcement action in accordance with the policies and expectations of Congress.

Cort v. Ash, 422 U.S. 66, 78 (1975), provides the familiar template for analysis of this question. 446 F.2d at 97-98; 114a-122a. In the discussion which follows, references to the legislative history, examined exten-

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66. *Touche Ross*, *supra*, 442 U.S. at 569; *Cannon*, *supra*, 441 U.S. at 690 n. 13.

67. *Cannon*, *supra*, 441 U.S. at 690 n. 13.

68. *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977).

69. *J. I. Case v. Borak*, 377 U.S. 426, 433 (1964).

70. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Calhoun v. Harvey*, 379 U.S. 134 (1964); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

71. *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

72. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975).

73. *Cannon*, *supra*, 441 U.S. at 690 n. 13.

sively above, is omitted. The four *Cort* factors are satisfied in this case:

1. *Especial beneficiaries*. No party to the litigation disputes that the retarded are among the developmentally disabled and thus "especial beneficiaries" of the act. 42 U.S.C. §6001(7) (definition of developmental disabilities).

2. *Congressional intent*. Congress, recognizing that an administrative cut-off of funding would not sufficiently protect the individual rights under §§6010(1) and (2) made specific its intention to create a remedy in a private cause of action. That section of the Act was added in 1975, long after the 1963 origin of the funding statute. This addition was explicitly to protect the rights recognized by the courts and the legislative history fully confirms that Congress expected continued judicial enforcement of the rights enumerated in the statute, especially the right to habilitation. *Naughton v. Bevilaqua*, 458 F.Supp. 610, 616 (D.R.I. 1978).[74] It is correct to presume that Congress had no intention of changing the means of enforcement of the rights when it had such knowledge of precedent. *Cannon, supra*, 441 U.S. at 696.

3. *A private remedy is not inconsistent with the underlying purpose of the legislative scheme*. The legislative scheme and recognition of a private right of action are consistent with one another. It is "necessary or at least helpful" to the fulfillment of the statutory purpose for individuals to be able to enforce the Act in court.

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74. In addition, Congress required the states to create a system for protection and advocacy of the individual rights of developmentally disabled persons with the authority to pursue "legal, administrative and other appropriate remedies" for such individuals. 42 U.S.C. §6012(a)(2)(B). With such a provision, it cannot be denied that Congress expected disabled persons, and the advocacy system on their behalf, to assert both statutory and constitutional rights in private actions. *See* note 62 *supra*.

Cannon, supra, 441 U.S. at 703. Congress specifically reiterates its desire that the states insure the protection of the legal and human rights of the developmentally disabled and the provision of services to allow them to reach their potential. 42 U.S.C. §6000(b)(1). As is the case with other civil rights acts, the purpose of the Act is both to avoid the use of funds for illegal and unconstitutional purposes and to protect individuals against the effects of such practices. *See Cannon, supra*, 441 U.S. at 704; *Naughton v. Bevilaqua*, 458 F.Supp. 610, 616 (D.R.I. 1978):

> [W]ithout a private right of action to focus on and redress individual past violations and deter future ones, the guarantees promised by the Act would have little meaning. A remedial scheme that addressed only institution-wide wrongs and ignored individual wrongs would be inconsistent with Congress' central concern to correct the past neglect by large institutions of individual rights and differences in needs and potential.

4. *The cause of action is not one traditionally relegated to state law.* A cause of action to provide developmentally disabled people with services to meet their habilitative needs is not one traditionally of state law. Naughton, supra, 458 F.Supp. at 617. Congress was aware that such actions have been brought in federal courts for many years under the Constitution and federal statutes. Although federal and state interests in the well-being of the disabled overlap,[75] 446 F.2d at 98; 116a, the particular §6010 cause of action has no counterpart in state law and cannot be said to be "traditionally relegated" to the states; there is no reason to forbid federal

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75. Every state has laws consistent with the Bill of Rights Act. *See* table at 70 *infra*.

courts to act upon the separate federal interests it is Congress' duty to articulate.[76]

Legitimate state concerns are not impaired by an implied remedy. Persons claiming an official denial of habilitation must show a causal connection between the injury and the allegedly wrongful conduct. *Rizzo v. Goode*, 423 U.S. 362 (1976). State officials are entitled to a qualified immunity for actions undertaken in good faith.[77] *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Persons actually injured by denial of care, however, will be entitled to injunctive relief ensuring future habilitation. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

V. Where petitioner government officials adamantly refuse to remedy their violations of respondents' rights and where protection of state and federal statutory rights would otherwise be impossible, individual determinations of need and appointment of a master with circumscribed supervisory duties does not violate principles of federalism and is not an abuse of discretion.

Faced with an adamantine refusal by the petitioners "to devise and present their own remedies for conditions at Pennhurst," 612 F.2d at 112; 150a[78] the trial court

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76. "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." *Helvering v. Davis*, 301 U.S. 619, 645 (1937) (Cardozo, J.), quoted in *Rosado v. Wyman*, 397 U.S. 397, 423 (1970) (Harlan, J.).

77. The named plaintiffs were denied damages in this case. 446 F.Supp. at 1324; 73a-75a.

78. After liability was determined on December 23, 1977, District Judge Broderick repeatedly attempted to obtain the cooperation of petitioners in formulating relief "tailored to cure the 'condition that offends' " the law. *Milliken v. Bradley*, 433 U.S. 267, 283 (1977), quoting *Milliken v. Bradley*, 418 U.S. 717, 738 (1974). The best the petitioners were willing to propose was "the same plan introduced by them at the trial in May, 1977," a plan which was "vague and indefinite." 446 F.Supp. at 1325; 78a (recounting the court's efforts to defer to petitioners proposals).

"on the basis of nine weeks' testimony in this case and the submissions of all parties, finds that the implementation of this Order will be impossible without the appointment of a Special Master. . . ." 446 F.Supp. at 1326; 80a-81a.[79] A master was appointed pursuant to Rule 53, Federal Rules of Civil Procedure, and the court's equitable powers.

Rather than wrest control of the retardation system from petitioners, the court carefully sculpted a minimal planning and supervisory role for its Master:

> As we understand the role of the Master under the decree, he is to supervise all implementation efforts with the aid and assistance of all parties to the lawsuit. The defendants will thus have an opportunity to participate in the structuring of relief.

612 F.2d at 112; 151a. In addition, the Court of Appeals found "it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated,"[80] requiring the District Court or Master to provide "individual determinations . . . as to the appropriateness of an improved Pennhurst for each such patient."[81]

A. Equitable Discretion Permits Choice Among Acceptable Alternative Structures for Relief.

This Court invariably recognizes the broad discretion which must be permitted lower courts in the sensitive and delicate task of fashioning relief, once liability has been determined. *E.g., United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944) ("where findings of violations are sustained, we will not direct a

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79. The record below demonstrated that, for decades, petitioners had been unable to remedy the conditions existing at Pennhurst in any significant way. Notes 93-95 *infra*.

80. 612 F.2d at 115; 157a.

81. 612 F.2d at 114; 156a.

recasting of the decree except on a showing of abuse of discretion."); *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950) (relief is "peculiarly the responsibility of the trial court"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 634 (1953) (decree sustained absent showing "that there was no reasonable basis for the District Judge's decision"); *Maryland & Virginia Milk Producers Asso. v. United States*, 362 U.S. 458, 473 (1960) ("no reason to reject the judgment" where court retains "right of visitation if appropriate."); *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976) (scope of remedial decree is matter of district court's "equitable discretion"); *Milliken v. Bradley*, 433 U.S. 267, 280 n. 15, 281 (1977) ("breadth," "flexibility and sensitivity required of equitable decrees.")[82]

Where Congress has by statute declared a national policy or where the public interest may be furthered, the Court's rule has been:

> Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest.

Virginian Ry. v. Federation, 300 U.S. 515, 552 (1937). *Accord, United States v. Morgan*, 307 U.S. 183, 194 (1939); *United States v. First Nat. City Bank*, 379 U.S. 378, 383 (1965).

In the case at bar, the question is not "Did the Court of Appeals formulate the *only* acceptable relief?" or even "Were there any alternative formulations of relief possible?" The question presented is rather, "Is the relief "a reasonable exercise of power, considering both the gravity of the situation that gave rise to the orders and the

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82. Lower court's discretion in matters relating to judgments has long been noted in this Court. *Sun Cheang-Kee v. United States*, 70 U.S. 320, 326 (1865). *See Pomeroy's Lessee v. State Bank of Indiana*, 68 U.S. 592 (1863).

extent to which they intrude on other important interests?"[83]

If, settling its mandate within the range of possible acceptable choices, a court fashions an equitable decree, the relief will be upheld. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 27, n.10 (1971).[84]

B. The Relief Granted is Fully within Appropriate Discretionary Limits.

Every element of relief upheld by the Court of Appeals was fully justified by the "circumstances present and the options available in each instance." *Swann*, 402 U.S. at 27 n.10. *See Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977). Petitioners' contrived and vague objections are entirely misplaced.[85]

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83. The quoted test is from *Morgan v. McDonough*, 548 F.2d 28, 31 (1st Circ. 1977), the Boston schools receivership case.

84. The concept of choice inherent in "equitable discretion" has been considered in connection with institutional litigation:

> Equitable discretion is a term usually associated with the idea of judicial choice. The idea of a choice necessarily implies that there are at least two acceptable alternatives and that the court has the power to choose between them.

Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L.Rev. 784, 857 (1978) (notes omitted). *See Lemon v. Kurtzman*, 411 U.S. 192 (1973).

85. The Court of Appeals erred in reversing Judge Broderick's orders that admission to Pennhurst be closed and that the facility be replaced. Undisputed facts proved abominable conditions which every member of the Court of Appeals found illegal and proved that every person confined in the institution can and should be cared for in a continuum of less costly, more effective structured community settings. An appropriate response to the facts is to ensure that nobody unnecessarily endure Pennhurst. It was not an abuse of discretion for the trial court to so order and, therefore, the questions presented in the cross-petition, No. 79-1414, Question Presented No. 4 *supra*, should be answered affirmatively and the Court of Appeals' decision reversed in this regard.

1. *Individual determinations*

Retardation and techniques for habilitation are not afflicted by the vagaries of the "baffling field of psychiatry;"[86] determination of a retarded person's habilitative needs is accomplished through methods and procedures, and with goals, set forth by Congress. 42 U.S.C. §6000 (7) defines "developmental disability" with precision and emphasizes that habilitative services are *individually planned and coordinated*. Section 6010, in each of its parts, stresses the need for services appropriate to *the individual person* and "designed to assure the most favorable possible outcome for those served." §6010 (4). Section 6011, "Habilitation Plans," provides for periodic review of specified plans for provision of *individually* determined services. Pennsylvania law similarly guarantees *individual* consideration of habilitative needs.

This Court has held, on several occasions, that federal courts may evaluate the "nature and duration" of an individual's confinement in a mental institution. *E.g. Jackson v. Indiana*, 406 U.S. 715, 738 (1972). It is patently frivolous to suggest, as petitioners do, that habilitation issues are nonjusticiable. *O'Connor v. Donaldson*, 422 U.S. 563, 574 n. 10 (1974);[87] *Parham v. J.R.*, 442 U.S. 584, 617 (1979).

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86. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

87. In *O'Connor* the Court held:

> O'Connor argues that, despite the jury's verdict, the Court must assume that Donaldson was receiving treatment sufficient to justify his confinement, because the adequacy of treatment is a "nonjusticiable" question that must be left to the discretion of the psychiatric profession. That argument is unpersuasive. Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present. See Jackson v. Indiana, 406 U.S. 715, 32 L Ed 2d 435, 92 S.Ct. 1845.

422 U.S. at 574 n.10. *Parham v. J.R.*, 442 U.S. 584 (1979) which dealt with voluntary admission of minors, supports the *O'Connor-Jackson* rationale in requiring, "On remand, the District Court is

Careful review of the needs and condition of every resident at Pennhurst is a *sine qua non* of determining whether an improved Pennhurst or one of a variety of habilitative alternatives is appropriate to satisfy the requirements of federal and state statutes. So held the Court of Appeals:

> The state statute, like the federal statute, was focused on *individual* needs. Since the statutory rights to treatment, state and federal, vindicate the individual patient's fundamental interest in personal liberty, it is only fitting that the Commonwealth be required to undertake a case-by-case investigation into how each person's rights may best be facilitated. (Emphasis in original).

612 F.2d at 115; 157a.[88] *Milliken II* teaches that the

NOTE 87 — *(Continued)*
free to and should consider any individual claims that initial admissions did not meet the standards we have described in this opinion." 442 U.S. at 617.

88. The dissent was at one with the majority is realizing not only that Pennhurst as an institution "is not providing its residents with minimally adequate supervision and care," 612 F.2d at 129; 192a, but that, as to individuals, particularized inquiry may be necessary:

> Moreover, my rejection of less-drastic means analysis does not mean that I conceive of a "properly run institution" as a monolithic concept unrelated to the needs of particular individuals. What may be the appropriate treatment very likely will vary from person to person within the institution. The test I choose — a right to treatment rationally related to the purpose of the state-imposed restraints on liberty — applies to every individual, whether inside or outside an institution. Thus in my view, the phrase "properly run institution" means properly run as to all those confined in it. Given the current medical definition of retardation and the fact that I do not know what a properly run Pennhurst would be like, I leave for future cases the question of whether a particular individual placed in an institution free of the deplorable conditions in the record here would ever have a constitutional right to treatment in a different environment.

Id.

"remedy is to be determined by the nature and scope" of the violation, and must relate to the offensive "condition." 433 U.S. at 280, 282. Here, the violation is the failure to provide individually determined habilitation and the offensive condition is the indefensible and undefended regime at Pennhurst. The individual determination remedy is one well within the lower court's discretion.

2. *Appointment of a Master*

Petitioners assert that the Court of Appeals' order violates principles of federalism and must therefore be reversed. A cursory analysis of the history of the case discloses the recalcitrance of the petitioners, their refusal to remedy systemic violation of respondents' rights, and the absolute necessity of an order "tailored to cure" the offending condition. *See Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

As the court below recites, 612 F.2d at 89-90; 150a-151a, after its finding of liability, the District Court provided respondents several opportunities to come forward with a plan to remedy the violations found by the court or to introduce evidence of relief and implementation. *Id.* The county defendants produced no plan and presented no evidence. The Commonwealth defendants resubmitted a "vague and indefinite" plan the court had rejected during the trial. 446 F.Supp. at 1325; 78a. At no time did any petitioner indicate willingness to conform its actions to the legal standards set forth by the court. *Id.* Without any enforcement tool, the respondents would have found themselves with a paper victory, confined among the horrors of Pennhurst, without hope. The Court of Appeals expressed the need for workable relief vigorously:

> It is abundantly clear that providing the 1200 Pennhurst residents with a right to habilitation in the least restrictive environment will be a complex

> and lengthy process, probably involving monitoring, dispute resolution, and development of detailed enforcement mechanisms. Were we to preclude the trial court from resorting to a master, we would help make self-fulfilling the frequently made prophecy that courts are institutionally incapable of remedying wholesale violations of legally protected rights.

612 F.2d at 111; 148a.

The Special Master in no way supplants state and local retardation authorities; the master "is to supervise all implementation efforts with the aid and assistance of all parties to the lawsuit. The defendants will thus have an opportunity to participate in the structuring of relief." 612 F.2d at 112; 151a. In shaping the activities of the Special Master, the District Court has been even more limiting than the Court of Appeals' careful language; under the implementation orders of Judge Broderick, the Commonwealth and counties are given the responsibility for services to the disabled, with the Master acting as a stopgap and the court's eyes and ears. *E.g.*, Order of April 24, 1980 (pursuant to Court of Appeals' mandate, consolidating and amending all prior orders of the District Court).[89]

In addition, because a state statute and a federal statute form the basis for the petitioners' obligation to provide habilitation, and because "[t]hese duties were known and consented to," any relevant federalism com-

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89. The use of "persons unconnected with the court to aid judges in their performance of specific judicial duties" is a proper and familiar phenomenon. *In re Peterson*, 253 U.S. 300 (1919). This Court itself uses masters in certain situations. *See Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779 (1975). On "master-supervised formulation" and administration of remedies, *see* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. R. 784, 805-809, 836-837 (1978).

plaints are vitiated. 612 F.2d at 112; 151a. Such complaints, in fact, are considerable premature. A concrete disagreement raising federalism issues will not occur until a person is to be placed in a setting which is opposed by the state, counties or the person himself or herself. Such a placement will not occur without the opportunity to raise the issue in the District Court. There is time enough in a real case to raise and consider the federalism issue.

Respondents may yet offer "a plan that promises realistically to work, and promises realistically to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968). Barring such a plan, a federal court must exercise its broad and flexible power to effectuate a remedial decree to meet the fact situation before it. *Milliken v. Bradley*, 433 U.S. 267 (1977).

Serious and life-threatening conditions were found by the lower court to be the responsibility of state welfare department and county officials. Evaluation of the needs of respondents and development of a plan for the future are clearly remedial and not punitive, *see Milliken v. Bradley, supra*, 433 U.S. at 288, and are imperative to implementation of respondents' rights. The record conclusively demonstrates the inability of the Commonwealth to act and the failure of the counties to provide mandated services. "Judicial authority enters only where local authority defaults."[90] *See Milliken v. Bradley, supra*. A more persuasive case of such local default could hardly be imagined.[91]

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90. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971). In *Swann*, as here, the patient district judge urged the school board "on at least three occasions" to "come forward with an acceptable plan of its own." *Id.* at 24.

91. Respondents fail in their struggle to draw this case under the rubric of *Rizzo v. Goode*, 423 U.S. 362 (1976) and *Bell v. Wolfish*, 441 U.S. 520 (1979). In both those cases, lower courts were found to have entered orders far beyond the bounds of any cognizable rights. Here, the Court of Appeals has done nothing more than uphold a mechanism for directly implementing state and federal

3. *Implications for other states of nature of relief in Pennsylvania*

Declaration of a federal or state statutory right to habilitation in an appropriate individually determined setting threatens neither the policies nor the practices of the states.

a. Relief in this case, as in any other, is tailored to specific local history and circumstances. *Swann, supra; Milliken II, supra.* Pennsylvania presents a tragical ironic combination of historic development of extensive community services,[92] actual availability of millions of unspent dollars for such services,[93] a horrendous insti-

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NOTE 91 — *(Continued)*
statutory rights. In *Rizzo* and *Bell*, unlike this case, there was no recalcitrance by government officials in hewing their actions to the limits of the law.

Bell did not restrict judicial intervention into "deplorable conditions and draconian restrictions" which "federal courts rightly have condemned. *Id.* at 562.

92. Pennsylvania is a "leader among states" in its residential programs for the retarded, Tr. 7-4 Settle, with a "highly developed" system. Tr. 12-26 Conley. *See* Tr. 6-50, ("excellent" facilities in community for former Pennhurst residents), 6-52 to 56 Glenn; photographs 69, 71, 73, 74, 76-79, 82 and 83 at Ex. G-48 (existing community facilities). In 1965, Pennsylvania's "comprehensive mental retardation plan" became one of the first in the country and its 1966 state statute was "one of the earliest of such acts and really began to focus on alternatives to institutional care." Tr. 7-82 to 83 Dybwad. *See* Tr. 19-212 Aaronson.

93. Between $15,000,000 and $18,000,000 of $21,000,000 appropriated "for community facilities to free 960 Pennhurst residents and allow them to live in the community," Tr. 7-83 Dybwad, remained unspent at the time of the trial. Tr. 97-97 to 98 Dybwad (stipulation by defendants): PARC Ex. 60 (status report on funds); Tr. 13-136, 159 Hersh. For the years 1972 through 1975, the five county defendants returned to the state $5,600,000 in unexpended funds for community retardation services. PARC Ex. 58; Tr. 7-98 Dybwad. The cost of Pennhurst would more than cover the cost of community care for every one of its residents. Tr. 27-39 to 40 State Regional Retardation Commissioner Rice.

tution slated for elimination,[94] and a systemic inability and refusal to protect the lives of retarded people.[95] Mechanisms necessary to provide effective relief for Pennhurst residents have been melded by the lower courts into orders tailored to *this case;* no mold of universal applicability need be cast by this Court.

Implementation of the rights of retarded persons in other states requires courts to examine local law, the status and history of both institutional and community resources and current efforts of defendant officials to fulfill their responsibilities. While the ultimate requirement of the Bill of Rights Act — individually determined habilitation in an appropriate least restrictive setting — may not be compromised, "there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Swann, supra,* 402

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94. The State Regional Retardation Commissioner testified that the state's intention is that "sometime in 1983 Pennhurst would be empty," under a five-year plan. Tr. 28-48, 101 Rice; 1-183, 185 Roos State officials believe that no person need be in the institution. Youngberg Dep. 102; Tr. 22-171 to 172 Youngberg; Tr. 22-77 Foster; Foster Dep. 63; Rice Dep. at 180-181; Tr. 26-22 Rice. The experts retained by the state agree. Tr. 14-73 Thurman; Tr. 14-21 Walker.

95. Reiterated instances of the defendants' recalcitrance cover the record. Although as early as 1965 Pennsylvania knew what must be done, virtually nothing happened despite extensive plans, studies, reports, and blueprints. *E.g.*, Tr. 7-82 to 93 Dybwad; 1-174 Roos; 13-159 to 163 Hersh; PARC Ex. 18 through 27; 59, 60; Plaintiffs' Ex. P-2, P-16, P-17. The $21,000,000 intended in 1971 to move 960 people from Pennhurst had benefited only 40 people at the time of trial. Tr. 28-19 to 20 Rice. State defendants do not monitor or work with the counties and the counties fail to plan properly or abide by state law. Tr. 12-16 to 19, 42 to 43 Conley; 13-134 to 136 Hersh; 18-116 to 18-132 Hindman; 28-11 to 13, 16 Rice. This "confusion," of course, causes harm to the plaintiffs; for example, Pennhurst recommended community care for Nancy Beth Bowman, but nothing was done. Tr. 13-91 Bowman.

U.S. 1, 27 n. 10, quoting *Green v. County School Board*, 391 U.S. 430, 439 (1968). "*Actio quaelibet it sua via.* (citations omitted). Every action proceeds in its own peculiar course." Henig, *Maxims* in *Branch's Principia Legis et Aequitatis* at 12 (1824).

b. Every one of the fifty states has, by statute, provided for some or all of the rights and policies recognized by the lower courts in the case at bar.

As the overlapping categories in the Table on the following pages summarizes, 26 states establish a right to habilitation or treatment, 17 establish a state responsibility or policy to provide habilitation or treatment, 14 explicitly require services in the least restrictive environment, 8 explicitly require an individualized plan and 5 either name specific facilities to provide habilitation or treatment or grant authority to enforce laws relating to habilitation or treatment in community centers.[96]

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96. The statutes from which the table is drawn are ALA. CODE, tit. 22, §§22-50-11, 22-52-51 (1975); 1978 ALASKA SESS. LAWS ch. 165, §1; ARIZ. REV. STAT. ANN. §36-551.01 (West. Supp. 1979-80); ARK. STAT. ANN., tit. 59, ch. 10, §§59-1002(i), 59-1009(a)(1971); CAL. WELF. & INST. CODE §4502 (West Supp. 1980); COLO. REV. STAT., tit. 27, §27-10.5-115 (Supp. 1973); CONN. GEN. STAT. ANN., tit. 19, §19-575a (West 1958); DEL. CODE, tit. 16, §§5502-5507; tit. 9, §2612, as amended by S.B. No. 130th Gen. Ass. (Signed July 10, 1980); D.C. CODE, Bill 2-108, "Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978," §§102, 103; FLA. STAT. ANN., tit. 28, §394.459 (West Supp. 1980); GA. CODE ANN. §§88-2502 (Supp. 1979); HAWAII REV. STAT., tit. 19, §§33 E-1, E-2; IDAHO CODE §56-238; ILL. ANN. STAT., ch. 91½, §2-102(a) (Supp. 1980-81); IND. CODE ANN. §16-14-1.6-2 (Supp. 1979); IOWA CODE ANN., tit. 21, §222.1 (West Supp. 1980-81); KAN. STAT. ANN. §75-3307b(a) (Supp. 1979); KY. REV. STAT. ANN., tit. 17, §202.267 (1969); LA. REV. STAT. ANN., tit. 40, §2013.50 (West 1977); ME. REV. STAT. ANN., tit. 34, ch. 221, §2601 (1964); MD. ANN. CODE, art. 59A, §8A (1979); MASS. ANN. LAWS, ch. 123, §2 (1972); MICH. COMP. LAWS ANN. §330.116; MISS. CODE ANN. §41-19-81 (1973); MO. ANN. STAT., tit. 12, §202-900 (Supp. 1980); MONT. CODE ANN. §53-20-142 (1979); NEB. REV. STAT., ch. 83, art.

An increasing number of states have responded to federal developments by enacting laws explicitly serving "developmentally disabled" people (*e.g.*, Arizona, California, Hawaii, Indiana, New Hampshire, New Jersey, New Mexico, Wisconsin and Wyoming). Some states emphasize the goal of services for a person as "an early return to his community" (Florida) and others echo the refrain that services should be "as close as possible to the patterns and norms of the mainstream of society." (Maine, for example). The states do not restrict these rights to the least disabled, but rather stress that all are entitled. *E.g.*, Delaware's right to habilitation "no matter how severe their disability may be."

c. States' legitimate interest in adopting and pursuing their own strategies for compliance with the Developmentally Disabled Assistance and Bill of Rights Act are supported, not undermined, by a correct construction of the opinion of the Court of Appeals. They would not be required to "easily" and "immediately deinstitutionalize" without regard to the context in

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NOTE 96 — *(Continued)*
1(h), §83-1, 141 (1976), as amended, 1979 Neb. Laws, LB187, §253; NEV. REV. STAT., tit. 39, §443.484 (1979); N.H. REV. STAT. ANN., tit. 10, §171A-13 (Supp. 1979); N.J. STAT. ANN. §30:6D-9; N.M. STAT. ANN., §43-1-8 (1978); N.Y. MENTAL HYG. LAW, tit. C, art. 13, §13.01 (1978); N.C. GEN. STAT., §122-55.6 (1974); N.D. CENT. CODE, §25-16-10, 25-17-03 (1970); OHIO REV. CODE ANN., tit. 51, §5123.85 (1974); OKLA. STAT. ANN., tit. 43A, ch. 1, §§50, 3, 93 (West Supp. 1979); OR. REV. STAT., tit. 35, §427.010 (1977); R.I. GEN. LAWS §40.1-22-6, §§40.1-21-4, 40.1-22-6, 11, 40.1-1-10.1 (Supp. 1979); S.C. CODE §44-21-20 (1976); S.D. CODIFIED LAWS ANN., §27B-8-11; TENN. CODE ANN. §33-501 (1977); TEX. MENTAL HEALTH CODE ANN., tit. 92, art. 5547-300, subch. C, §§7, 11 (1980); UTAH CODE ANN. §64-8-6 (1953); VT. STAT. ANN., tit. 33, ch. 49, §3613 (1979); VA. CODE ANN. §37.1-194 (Supp. 1980); WASH. REV. CODE ANN. §71.20.010 (1975); W. VA. CODE §§27-5-9, 27-5-4(j), 27-2-3 (1980); WIS. STAT. ANN., tit. 7, §51.61 (West Supp. 1979-80); WYO. STAT. ANN. §35-1-612 (Supp. 1979).

ALL STATES' STATUTORY PROVISIONS REGARDING RIGHTS TO HABILITATION AND TREATMENT FOR THE MENTALLY DISABLED*

States	Statute establishes a right to habilitation or treatment	Statute establishes state responsibility or policy to provide habilitation or treatment	Statute explicitly requires services in least restrictive environment	Statute explicitly requires an individualized plan	Other statutory requirements
Alabama		X			
Alaska	X				
Arizona			X		
Arkansas		X			
California	X				
Colorado	X				
Connecticut	X				
Delaware	X				
District of Columbia	X		X	X	
Florida	X		X		
Georgia		X			
Hawaii		X			
Idaho	X				
Illinois	X		X	X	
Indiana	X				
Iowa					X[2]
Kansas					X[4]
Kentucky	X				
Louisiana					X[2]
Maine	X		X		
Maryland		X		X	
Massachusetts	X	X			
Michigan		X			
Minnesota		X			X[1]
Mississippi					X[1]
Missouri		X	X		
Montana	X				

ALL STATES' STATUTORY PROVISIONS REGARDING RIGHTS TO HABILITATION AND TREATMENT FOR THE MENTALLY DISABLED*

States	Statute establishes a right to habilitation or treatment	Statute establishes state responsibility or policy to provide habilitation or treatment	Statute explicitly requires services in least restrictive environment	Statute explicitly requires an individualized plan	Other statutory requirements
Nebraska		X			X[1]
Nevada	X				
New Hampshire	X				
New Jersey	X		X		
New Mexico	X		X	X	
New York		X			X[1]
North Carolina	X			X	
North Dakota		X			
Ohio	X			X	
Oklahoma		X	X		
Oregon					X[2]
Rhode Island			X		
South Carolina		X	X		X[1]
South Dakota	X			X	
Tennessee		X			
Texas	X		X		
Utah					X[2]
Vermont	X				
Virginia		X			
Washington		X			
West Virginia	X		X	X	X[1]
Wisconsin	X		X		
Wyoming	X				

This chart includes only statutes; no regulations or published administrative policies have been considered.

1. Excluding Pennsylvania.
2. Statute names specific facilities to provide habilitation or treatment.
3. Statute grants state authority to enforce laws relating to habilitation or treatment in community centers.
4. The state shall coordinate services.

which each operates.[97] Rather, only where local authorities default, as in Pennsylvania, will courts be compelled to fill the vacuum.

The Court of Appeals' "programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . ." *Milliken v. Bradley*, 433 U.S. 267, 290 n.22 (1977). Nor did Congress mandate the impossible. A states' effective action to provide individually appropriate habilitation under §6010 of the Act cannot be completed in a day, but it can be undertaken.

CONCLUSION

For the above reasons, the Court of Appeals should be directed to fully affirm the District Court's orders, including the requirement that the large isolated and irredeemable institution called Pennhurst be replaced through the existing Pennsylvania continuum of structured community residential and support services. In the alternative, the decision of the Court of Appeals should be affirmed, unless certiorari is dismissed as improvidently granted.

As a co-sponsor of the 1978 amendments to the Bill of Rights Act declared:

> The time has been long coming that our handicapped citizens are given the opportunities which every American citizen has the right to enjoy. It is

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97. Amici Curiae Brief for Illinois, *et al.*, at 38-39. These *amici* states "do not oppose deinstitutionalization where appropriate" and are implementing "comprehensive deinstitutionalization plans concerning the majority of individuals now receiving care in public institutions for the mentally retarded." *Id.* at 1-2. *See* Brief of Connecticut as Amicus Curiae at 1-2. There is no disagreement with the wisdom of the Court of Appeals' approach but rather a divergence of views as to the appropriate source of the impetus for deinstitutionalization.

> our intention not only to help those in need of rehabilitation but to help the many severely handicapped to live a more independent existence and not to be confined to a cell in an institution.

124 Cong. Rec. S.15569 (Sen. Hatch).[98] "As lawmakers and as citizens we must help protect the rights of these severely handicapped persons." 124 Cong. Rec. S.15548 (Sen. Randolph).

Respectfully submitted,

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Penelope A. Boyd

Counsel for Respondents
*Terri Lee Halderman, et al.**

October 20, 1980

98.

> It is morally wrong, when an affluent and supposedly compassionate nation allows thousands upon thousands of people to be shut away, forgotten, and left simply to exist. There is a great need for a variety of continuing services for severely handicapped persons, who have much to contribute — if they have the necessary support services.

124. Cong. Rec. S.15657 (Sen. Humphrey).

*Counsel gratefully acknowledge the support and assistance of Virginia Raymond, Joseph P. Green, Jr., Martha Boston, Mary Lovitz and Carol Robinson.

APPENDIX

Narrative Summary of the Record

The record in this case is an extraordinary documentation of every facet of the institution called Pennhurst. Even the detailed summary below cannot begin to tell it all.

Areas considered include an introduction to the institution and the physical environment,[1] injuries and physical abuse,[2] psychological abuse and absence of program,[3] physical restraints, chemical restraints and seclusion,[4] regression,[5] potential for improvement of the institution,[6] and community services.[7]

A. The Institution

The effect of Pennhurst State School and Hospital on its residents, mentally retarded people, is the focal point of this action. Pennhurst was established on the

1. Pages A1-A7.
2. Pages A9-A12.
3. Pages A12-A15.
4. Pages A15-A18.
5. Pages A18-A20.
6. Pages A20-A22.
7. Pages A22-A26.

outskirts of Spring City, Pennsylvania, in 1908 as the Eastern Pennsylvania School for the Feeble-Minded and Epileptic.[8] Its purpose then and its purpose today is to provide training for mentally retarded citizens to enable them to return to our society and function as productive members of it.[9] Throughout its history, Pennhurst has been unable to fulfill this intention.[10] Instead, it has continually visited inexorable physical and psychological damage on those it was established to assist, increasing the helplessness of persons who by virtue of their handicap are least able to resist an inflexible system and most likely to suffer from it.

Retardation is neither a disease nor an illness.[11] It is a handicap which manifests itself in impaired intellectual ability and, in some cases, problems in adaptive be-

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8. Act 424, Laws of Pennsylvania (May 15, 1903), Act 42, Laws of Pennsylvania (April 4, 1907).

9. Mental Health and Mental Retardation Act of 1966, 50 Pa. Stat. Ann. §§4101 *et seq;* "care and training," Act 424; "maintenance and training," Act 42, *supra* note 8; Ex. P-1, P-2, P-6.

10. Pennhurst has been successful in achieving another explicit purpose of state legislation, "segregation" of the retarded at the facility. Act of June 12, 1913, 32 Laws of Pennsylvania 494.

11. Mental retardation and mental illness have no similarity to one another; they are "two entirely different conditions."

> Mental retardation refers primarily to a deficit in intellectual development and social adaptation; whereas mental illness refers to a disorder of thinking, emotions and behavior.
>
> Mental retardation occurs usually either prior to, at, or shortly following birth; whereas mental illness can occur at any time in life and often the onset is during adulthood.
>
> Mental retardation is primarily an educational problem; mental illness is primarily a psychiatric problem.
>
> Whereas mental retardation is essentially irreversible, that is, although it can be improved, there is at this stage of our knowledge no cure; mental illness is often reversible and curable.

Tr. 1-87 to 88 Roos; 446 F.Supp. at 1298; 10a; Tr. 2-2 to 2-12 Clements.

havior.[12] While mental retardation cannot be cured in the conventional sense, its effects can be overcome through habilitation, the process by which retarded individuals are aided in acquiring and maintaining those life skills which enable them to cope more effectively with their environments and raise their level of physical, mental, and social efficiency.[13] Habilitation requires normalization of the individual's living situation because where culturally valued means are employed, retarded people are enabled to live valued lives and they respond in a fashion which minimizes the limitations of their conditions.[14] "The principles of normalization have been accepted by the administration of Pennhurst and by the Department of Public Welfare, which is responsible

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12. "Mental retardation is essentially a problem of learning, a defect particularly of the individual's ability to think abstractly, to exercise judgments, to solve problems, and to retain information. Tr. 1-85 Roos; 6-94 to 95 Settle; 446 F.Supp. at 1298; 10a; Tr. 2-13 Clements.

13. Tr. 1-96 to 1-97 Roos; 5-186 Glenn; 446 F.Supp., at 1298; 10a. Habilitation is "A generic term we use to refer to the many specific activities designed to foster maximum development of the individual. Included in the term are various approaches to education, the development of social and intellectual skills, the development of pre-vocational and vocational skills, and related types of activities." Tr. 1-95 to 96 Roos. It is implementation of the developmental model of mental retardation. "By [the developmental model] we mean essentially that retarded individuals should be approached with the assumption that they are capable of growth, of development, of learning; that the environment which we provide for them has a major impact in determination of the rate of this development, indeed, that the human organism is highly plastic and is in continued interchange with our environment. Tr. 1-105 to 106 Roos.

"[W]ith proper habilitation, the level of functioning of every retarded person may be improved" and people "may be removed from the ranks of the retarded." 446 F.Supp. at 1298; 10a; Tr. 2-7 Clements.

14. Tr. 1-106 Roos; 5-88 Girardeau; 5-186 to 187 Glenn; 7-120 Hirst. "Normalization" is a technical word of art which encom-

for the administration of programs in the five county area. . . ." 446 F.Supp. at 1311; 42a (citations to record omitted).

Pennhurst is not providing, nor has it provided, habilitation or a normalized environment to its residents.[15] They have had only the opportunity to learn self-defense and survival techniques necessary to a continued existence in an institution.

B. The Physical Environment at Pennhurst

The District Court found that "the physical environment is hazardous to the residents, both physically and psychologically." 446 F.Supp. at 1308. This finding was not made lightly, but rather was based on consideration of the testimony of eighty witnesses, who included thirteen experts on mental retardation, nine parents of retarded persons who lived at Pennhurst, three former residents of Pennhurst, thirty-nine employees of Pennhurst, and two officials of the Commonwealth of Pennsylvania. Voluminous documentary evidence, including photographs of Pennhurst, were also introduced at the trial before Judge Raymond J. Broderick.

NOTE 14 — *(Continued)*

passes the techniques and goals of habilitation. *See* Wolfensberger, "The Definition of Normalization: Update, Problems, Disagreements, and Misunderstandings," in *Normalization, Social Integration and Community Alternatives* (Flynn & Nitsch eds. 1980). Normalization means that the "environment should be designed to increase the complexity of the behavior of the developing individual to increase his human qualities as these are defined by the world in which we live.*** [U]nfortunately we have tended to foster and generate deviancy by treating people as if they were different by isolating them and segregating them from society. Tr. 1-106 to 107 Roos.

15. 446 F.Supp. at 1318; 58a. "[F]or the retarded class members as a whole, Pennhurst cannot be an appropriate setting in which to provide habilitation." 612 F.2d at 114; 156a.

Currently, Pennhurst does not meet minimum professional or governmental standards set for such an institution for mentally retarded persons.[16] As the Acting Medical Director of the institution admitted at the trial, Pennhurst's ". . . physical plant itself would not measure up to any standards" Tr. 19-185, Hedson. Many of its buildings have been in use since its founding in 1908 and the deteriorating structures are in constant need of repair.[17] Often the buildings are fire traps.[18]

Concrete and tile are the primary components of the physical environment at Pennhurst.[19] Petitioners' characterization of the living quarters which house the majority of residents as "larger older dormitory settings" distorts the daily living conditions of Pennhurst residents. Brief for Petitioners at 2 n.2. Residents live in "totally intolerable conditions." Tr. 1-175, Roos. The buildings at the institution are subdivided into wards, each ward consisting of, at least, a sleeping area, a dayroom and a bathroom, none of which are constructed or used in a fashion which might be minimally consistent with the common perception of a dormitory.[20]

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16. *E.g.*, 446 F.Supp. at 1302, 1308; 24a, 34a. Tr. 19-185 Hedson; 7-54 Dybwad ("emergency" conditions); 1-172 to 173 Roos ("totally unsuitable buildings"); 1-110 to 115 Roos (professional and governmental "minimum standards" not met).

17. Tr. 8-127 Hirst; 2-159 Taub; Ex. G-42, G-46.

18. The Security Office at Pennhurst is its own fire department from 3:00 p.m. to 7:00 a.m. Ruddick Deposition at 7, 38. Security personnel have extinguished minor fires "numerous times." *Id.* at 38-39. Tr. 9-145 Sobetsky; 6-146 to 150 Settle.

19. *E.g.*, Clements N.T. 2-54, 2-57, U.S. Ex. 48, Photos 21, 26.

20. As one former resident of Pennhurst described his former home, "It looks like a darn big place and it has a gang of boys. They sleep together and all." Tr. 8-5 Troester. Mr. Troester entered Pennhurst at the age of seven. He left the institution for the community at the age of 18, and is now employed. His story is discussed *infra* at 28. Another former resident explained, "It was like one big room with forty in them." Tr. 8-22 Hill.

The mother of two named plaintiffs described their ward as "the most awful place I have ever seen in my life." Tr. 13-19 Taylor. She was asked:

> Q. What did the ward look like physically?
>
> A. Physically, the floors were concrete. They were cracked, full of holes.
>
> The place smelled of urine and feces.
>
> The holes in the concrete were filled with filthy water and the children looked like prisoners.[21]

It is "a stultifying and essentially a dehumanizing environment." Tr. 7-52 Dybwad.

In sleeping areas on the wards at Pennhurst, beds are found row upon row. One ward was described as having three rows of four beds with about three or four feet of space separating them; a five foot high tile wall separates the rows of beds.[22] Sleeping areas are often insufficiently furnished, and generally lack any provisions for individual privacy, much less sufficient pillows, bedspreads or decoration.[23]

Dayrooms at Pennhurst, where the bulk of the residents' time is spent, often have no furniture at all, although some have a few chairs or tables and a television, and the rooms are poorly lighted.[24] The hard surfaces

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21. Tr. 13-19 Taylor. *See* Tr. 12-82 Caranfa (ward of plaintiff Sorotos a "big room with a broken cement floor"); 1-132 Roos ("a very barren place . . . just bare floor and bare wall"); 1-171 Roos describing Photo 54 in Ex. G-48; ("just the bare floor and walls, and that is a resident almost nude lying on the bare floor"); 8-109 Hirst; 7-53 Dybwad ("an ugly place," "inhuman dimensions"); 2-152 Taub ("snakepit" where plaintiff lived); 4-70 Lancaster-Gaye.

22. Nagle Dep. at 16-18.

23. Photos 29, 30, and 56 at Ex. G-48; Tr. 1-149 to 150 Roos; 2-54 to 55, 93 to 94 Clements; 19-46 Pirmann; Smith Dept. at 43-44; Nagle Dep. at 16-18.

24. *E.g.*, Photo 54, 102 and 103 at Ex. G-48; Tr. 1-171 Roos, 6-149 Settle; Smith Dep. at 43-44; Nagle Dep. at 5-10; notes 19-21 *supra*.

and lack of furnishing amplify the continuous "blaring" noise at the institution.[25]

The shower and bathing areas on the wards of Pennhurst are as dehumanizing as the sleeping areas and dayrooms. Consistent with the rest of the ward environment, they are totally bereft of provisions for privacy; like the beds, the toilets are lined row upon row, without doors or partitions to grant even minimal privacy.[26] Toilets lack seats "universally" and toilet paper.[27] The hard surfaces of the bathroom floors, already dangerous because slippery, are made even more so so due to the practice of covering them with wet sheets.[28] Bathing areas have no soap or towels.[29] These are "conditions which violate the very basic rules of hygiene." Tr. 1-158 Roos.

Pervasive filth in all areas of the wards compounds the problems of barren and dehumanizing design and

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25. Tr. 1-150 Roos; 6-149 Settle; 5-98 Girardeau. "Moreover, the noise level is often so high that many residents simply stop speaking. (Clements, N.T. 2-59)." 446 F.Supp. at 1308; 35a.

26. Tr. 1-149, 158, 169 to 170 Roos (no privacy, dirt, "feces on the wall and the floor"); 2-40 Clements; Troester 8-6 to 7; Photos 5, 39, 105, 106 at Ex. G-48; Barton Dept. at 26.

27. Tr. 1-158 Roos; 5-96 Girardeau; Nagle Dep. at 26; 2-160 Taub; 3-142 Lowrie.

28. Photo 39, 42, 43 and 44 in Ex. G-48; Tr. 2-42 to 45 Clements; 446 F.Supp. at 1309; 37a (plaintiff DiNolfi lost an eye after slipping in shower).

29. Photo 7 in Ex. G-48; Tr. 2-41 to 43 Clements; 1-149 Roos. During the mass showering in "wide open" areas, Tr. 8-6 to 7 Troester, residents have been "squirted down with a big hose" while "screaming with fear." Tr. 12-82 to 83 Caranfa (regarding plaintiff Sorotos). For morning washing, a Pennhurst employee explained, "We might take a wet rag across legs and arms." Nagle Dep. at 40. The absence of soap, towels and adequate bathing procedures have serious consequences for treatment. Tr. 2-41 to 43, 45 Clements. In addition, physically dangerous bathing practices are engaged in. Tr. 2-38 Clements (describing photo 1 in Ex. G-48).

non-existence of basic necessities of hygiene. Excrement and urine are often found on the floors of wards; bathrooms contain unflushed toilets, excrement on toilet seats (when seats are available at all), walls and floors.[30] One expert witness "observed excrement, urine, dirty mops strewn about, [and] pools of water on the floor."[31] Urine and feces remain on ward floors, in residents' beds and on bodies for lengthy periods of time.[32]

As might be expected, the ubiquitous filth at Pennhurst causes interminable odor as well as infestation of vermin. Roaches permeate the facility. Smith Dep. at 38, 47. Flies are commonly observed crawling on the bodies of residents. Tr. 18-69 Pool.[33] Residents suffer from epidemics of pinworms and various infectious diseases.[34]

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30. Tr. 1-158, 160, Roos; Smith Dep. at 41; Photo 50 at Ex. G-48. Seclusion rooms have feces on ceilings and walls. Tr. 1-134 Roos; 4-179 to 190 Lowrie; Ex. P-6 (Pennhurst staff committee report).

31. Tr. 1-160 Roos.

32. "There was frequently urine and feces on the floor, under their fingernails, in their hair and still is" Tr. 12-63 Caranfa (re plaintiff Sorotos); 2-161 to 162 (defecation in beds); Smith Dep. at 41 (floors),

33. One witness testified:

> There was one time when there was a baby lying on the floor and the flies were in her mouth and nose and I picked them out and asked the girl who worked at Pennhurst, Dorothy, in charge of the ward, to do something about it.
>
> And she said, "Well, what do you think I can do."
>
> And I came downstairs and complained to Norma Beard and I said they should have the baby in a crib with mosquito netting over the crib.
>
> It was summer and there were a lot of flies drawn by all the urine and feces all over the place.

Tr. 12-80 to 81 Caranfa.

34. Tr. 16-193 Conley; Hedson Dep. at 1222.

C. Injuries and Physical Abuse

Accidents on slippery floors and diseases are far from the only harms inflicted by Pennhurst on its residents. Rather, the catalogue of hazards is as long as it is shocking, as is evidenced by a report of just one month at the institution. In January of 1977, for example, 833 residents of Pennhurst suffered minor injuries and 25 residents suffered major injuries.[35] After reviewing this summary of injuries to residents, one expert characterized the document as a "battlefield report" and concluded that "[i]t appears that it is physically hazardous for the residents to be in the environment."[36] The number of injuries at Pennhurst is "fairly constant," a Pennhurst official testified.[37]

Each named plaintiff sustained serious injury while in the institution. 446 F.Supp. at 1309-1310; 36a-40a. Larry Taylor "was beaten about the head and face so badly he was unrecognizable. You couldn't see eyes, nose and mouth. I mean he was totally beyond recognition." Tr. 13-30 Taylor; letter to superintendent 13-64 to 65. Both Larry and Kenneth Taylors' "heads have been cracked open so often that there are spots on their heads where they will never grow hair." Tr. 13-23 Taylor. Nancy Beth Bowman "was bruised constantly, marked, black eyes" so that she "will be scarred for the rest of her life." Tr. 13-72, 75 to 77, 94 Bowman. Pennhurst classi-

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35. Ex. G-15; Youngberg Dep. at 78-84; Tr. 158, 163, 164 to 169 Roos. Very few bones in residents' bodies have not been broken at one time or another. *See* Tr. 15-130 Girardeau; Ex. G-18 (fingers and toes); Hedson Dep. at 116 (ribs); 1-165 Roos (broken arm not discovered for 24 hours); Hedson Dep. at 101 (arm); 7-137 Hirst (pelvis); Mathew Dep. at 81 (spine). *See* Ex. G-14 (Pennhurst Accidents and Injuries Committee Study of Fracture Records), described at Tr. 7-132 to 137 Hirst.

36. Tr. 1-163 Roos. *See* 1-164 to 169 Roos.

37. Tr. 22-40 to 41 Foster. Experts retained by the defendants agreed that the injuries were preventable. Tr. 13-154 Hersh.

fied serious injuries as "minor,"[38] including many of those observed every week for seven years (except for four occasions) on plaintiff Sorotos.[39]

Terri Lee Halderman sustained one of her forty injuries when, despite staff's knowledge of Ms. Halderman's need for supervision, she was permitted to walk around her living unit at four in the morning in a camisole (straightjacket) and a helmet. She was found lying on the floor two hours later bleeding profusely from the mouth. An aide sought and was granted permission to pull from Halderman's mouth what appeared to be a tooth; the material was later found to be part of the plaintiff's jaw, broken in the fall.[40]

Lack of supervision of residents has often caused injury and death to persons confined at Pennhurst.[41] Residents have drowned, both in bathtubs at Pennhurst and in the Schuylkill River, which flows through the grounds of the institution.[42] Often there are "missing residents" who are off the ward without staff knowledge or supervision. Ruddick Dep. at 28-30.

The design of the living units at Pennhurst exacerbates the inadequacy of staffing, contributing to unsupervised activity and hence the frequency of accidents. One of the factors contributing to Ms. Halderman's jaw fracture was that the nature of the ward design there and on other units provides blind

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38. ". . . a bite, the skin is broken in maybe six or eight places and there are scabs formed and the bruises last two weeks, you couldn't classify it as a minor bite." Tr. 12-89 Caranfa. *Accord*, Tr. 13-29 Taylor.

39. 446 F.Supp. at 1309-1310; 38a. For injuries to other plaintiffs, *see, e.g.*, Tr. 9-151 to 153 Sobetsky; Tr. 9-11 Heinsicker.

40. Tr. 8-68 to 72 Hirst. Pennhurst staff were found by a special investigating committee to have acted improperly. *Id.* Recommended policy changes were not implemented. *Id.* at 88-71.

41. Hedson Dep. at 90, 96-98; Ex. G-22, P-62.

42. *Id.*, Tr. 7-164 Roos. After several deaths, a fence was built to prevent access to the river. Residents now simply climb over it. Ruddick Dep. at 33-34.

spots that made it very difficult for the aides to supervise all of the people all of the time.[43]

Abuse of residents by the staff has been an ongoing fact of life at Pennhurst, inevitable in an overcrowded and understaffed institution. Reported incidents of abuse[44] include the eyewitnessed rape of a resident by a direct care worker,[45] beating of residents with sets of keys and shackle belts,[46] and an aide's unprovoked tossing of a small, physically handicapped child across a room. In the last instance, after the child landed on his stomach on the cement floor of his ward, the aide approached him and slapped him across the face.[47] Plaintiff Bowman's family was not told of several incidents of physical abuse by staff of their child. Tr. 13-83 Bowman.[48]

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43. Tr. 8-72, 108 Hirst; 2-60 to 62 Clements. At the time of the jaw fracture, Ms. Halderman was living in a new Pennhurst building, built in the early 1970s, called New Horizons. It was described by one expert as follows: "You would never think of human beings living there. You might store things in such a building." Tr. 7-56 Dybwad. Pennhurst staff felt it was "no place for habilitation, for people to live." Tr. 8-109, 119 Hirst.

44. Abuse is not effectively monitored. Tr. 1-144 to 146 Roos.

45. Ex. G-37; Tr. 1-167 Roos; Ruddick Dep. at 17-23.

46. Ex. G-36, G-25; Tr. 1-167 to 168 Roos; 13-83 Bowman.

47. Tr. 3-113 Ruddick; Ruddick Dep. at 24-27.

48. Former residents of Pennhurst described being "slapped around" and beaten by staff, "some with their fists." Tr. 8-32 Hill; 8-34 Vaughn. On a visit to plaintiff George Sorotos, his foster mother witnessed a child thrown five or six feet through the air:

> While I was feeding Georgie the aide was slapping several different patients about the arms and shoulders and then she took one child by the back of the neck and held open the swinging door with one hand and threw the child through and he landed on all fours in the other room.

Tr. 12-79 Caranfa. More than 3,500 painful electric shocks, causing burns on his buttocks, were administered to a resident in a program approved by the Secretary of Public Welfare. Tr. 5-31 to 5-35 Lowrie; 8-102 to 103 Hirst (the "haphazard activity . . . did not work" to aid the resident); Depositions of Lowrie and Brody. The veteran head of the Psychology Department regarded the treatment as "inhumane and torturous." Tr. 8-103 Hirst.

On his tour of the institution, an expert who testified at the trial witnessed one resident severely beating another while the scene was casually observed by a staff member. "The employee was sitting there watching," because, said the employee, "that's not in my job description." Tr. 2-60 Clements.

D. Psychological Abuse and Absence of Program and Activity

In addition to blatant forms of dehumanization, Pennhurst residents are subjected to an inherently "almost totally impersonal" setting. 446 F.Supp. at 1303. Pennhurst residents live out their lives as a group, engaging in "life maintenance activities" timed for the convenience of staff. Residents are awakened between 5:30 and 6:00 a.m. and are "toileted," showered and dressed, assembly line fashion, in bathrooms containing open rows of toilets and group showers.[49]

Meals are a health hazard for residents. At special risk are those who are fed by staff who use improper feeding techniques, such as feeding individuals while they are lying down or by raking a spoonful of food across the upper teeth, or by feeding people too rapidly. Tr. 1-159 Roos. Thus, the danger of the resident literally inhaling his food is significantly increased and can lead to death by aspiration, asphyxiation, or aspiration pneumonia. *Id.*; Tr. 2-66 Clements. Those able to feed them-

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49. *Supra* notes 26-32; Barton Dep. at 26: Klick Dep. at 140; Tr. 1-149, 160 Roos; 2-40 Clements; 5-96 Girardeau; photos 5, 39, 105, 106 at Ex. G-48. Plaintiffs are often nude, dressed in underwear, or ill-fitting institutional clothes and without shoes or socks. Tr. 1-149 Roos; 12-81 to 83, 115 Caranfa; 13-23 Taylor; 13-80 Bowman. "It was ghastly. Here was this little seven year old boy and all these naked men milling around, screaming, swearing. He was terrified and, of course, I was heartbroken. Tr. 12-61 to 62 Caranfa.

selves are subjected to thefts of food by other residents, making nutritional planning impossible.[50]

Life at Pennhurst is a continuum of inactivity and idleness.[51] An expert said:

> This is what I described as enforced idleness. These individuals are simply vegetating and there seems to be no systematic activity.[52]

Records selected by Pennhurst staff for expert witnesses confirm the inactivity, *e.g.*, tr. 2-77 to 80 Clements, as do government surveys. Tr. 18-83 Pool. Parents of plaintiffs saw

> . . . zombies, people walking around like that in an enclosure, all in straitjackets, and walking with the arms tied up.

Tr. 2-151 Taub. And,

> The toys were in the cage and they weren't allowed to have them out. I never saw a toy played with ever.

Tr. 12-63 Caranfa.

The majority of Pennhurst residents do not receive sufficient programming by minimally acceptable professional standards according to superintendent and his superiors.[53] For example, in one Pennhurst unit residents

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50. Tr. 2-71 to 72 Clements; photos 36 and 37 at Ex. G-48. Lack of nourishment is likely. *E.g.*, Tr. 1-159 Roos. On many wards residents must eat with their fingers or use spoons, the only utensil provided them. Tr. 1-159 Roos.

51. Tr. 1-120 to 122 Roos; 2-57, 77 Clements; 5-98 Girardeau; 6-149 Settle; 14-61 Thurman (expert retained by defendants); photos 8, 14, 21, 23, 26, 31, 33, 52, 55, 56, 103 at Ex. G-48. "The individuals are simply sitting there whiling away their lives."

52. Tr. 1-172 Roos.

53. Tr. 1-119 Roos; 27-72, 77 to 78 Rice; Dep. of Rice at 179, 180.

have no programs to teach them handwashing, self-feeding or toothbrushing although they are in need of these skills.[54] Residents receive only 1½ hours of programmed activities weekdays (none on weekends), including non-beneficial activities such as television. 446 F.Supp. at 1304; 24 a.[55] Programs are "almost non-existent." Tr. 2-36, 76 Clements; 2-153 Taub (plaintiff Taub); 13-23, 37 to 38 Taylor (plaintiffs Taylor).

Residents in need of specialized programs do not receive them. The head of the Psychology Department testified that "hundreds" of residents needing psychological services were not receiving them, creating "a crippling situation."[56] Long waiting lists exist for every program at the institution.[57] For example, the Speech and Hearing Department accomodates one-sixth of the residents needing such services; physical therapy is given to less than half the people requiring it; most people at Pennhurst receive no recreation or occupational therapy.[58]

The institution encourages the development or increase of behavior problems among the residents; residents engage in self-stimulating behavior ranging from rocking to self-injury and aggressive actions toward others, to relieve the interminable boredom which permeates their lives at Pennhurst.[59] These behavior problems "are symptomatic of the institution." Tr. 8-107 Hirst; 2-83 to 84 Clements; plaintiff Bowman, for example, learned to bite others at Pennhurst. Tr. 13-71 Bowman.

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54. Nagle Dep. at 25, 36, 41.

55. Six hours per day is minimally adequate, Tr. 1-120 Roos, if done in small groups in specific training activities. *Id.* at 1-123.

56. Tr. 7-106, 107 Hirst.

57. Foster Dep. at 42; Tr. 1-153 to 154 Roos.

58. Foster Dep. at 42, 46; Rossi Dep. at 22; 446 F.Supp. at 1304-1305; 24a-26a.

59. *E.g.*, Tr. 1-96 to 98 Roos; 5-112 Girardeau.

There are no programs in use to decrease such behavior.[60]

E. Physical Restraints, Chemical Restraints and Seclusion

While adequate programming could reduce or eliminate these behaviors, note 60 *infra*, Pennhurst's response has been to restrain persons engaging in maladaptive behaviors. Control of residents is maintained through the use (and abuse) of physical restraints, seclusion and chemical restraints.

Physical restraints include such devices as shackles, straightjackets, chest restraints, security belts, face masks, halters, feet restraints, helmets, mittens, muffs and muff shackles.[61] The use of these devices is common at Pennhurst and it is used in lieu of treatment and for punishment.[62]

One expert described seeing residents' hands tied together, persons tied to a wheelchair by their wrists and persons tied to beds by their wrists and ankles.[63] One resident spent 2,041 hours tied to a bed from August to October of 1976.[64] Another spent 123 hours in hand re-

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60. Tr. 4-123 Lowrie; 1-143 Roos; Nagle Dep. at 56, 73-74. Commonly accepted humane teaching methods are available but not used at Pennhurst. *E.g.*, Tr. 1-123 to 130 Girardeau. This is graphically demonstrated by the experience of one school-aged person at Pennhurst. When at Pennhurst, he was kept in arm restraints which deprived him of the ability to bend his arms at the elbows because he would slap himself. When he was in school, where he had a program, restraints were not used. Nagle Dep. at 64-65, 94.

61. Photos 47-49 at Ex. G-48; Mathews Dep. at 62.

62. Tr. 1-133 Roos; 2-83 Clements; 5-125 to 129 Girardeau; 8-11 Troester; photo 18 at Ex. G-481 Ex. G-39, G-40. Restraints cause injury and death. One eleven year old resident of Pennhurst strangled on the restraints used to tie him to a chair. Ex. P-62. *See* Tr. 2-83 to 84, 87 Clements; 7-130 to 131 Hirst.

63. Tr. 1-134 to 135 Roos.

64. Mathews Dep. at 64-66.

straints during one month and still another spent 690 hours in hand and feet restraints in another month.[65] Not only are restraints dangerous in and of themselves, but their use makes residents more subject to the attacks of others.[66] In addition, participation in programming is physically impossible.[67]

Without notice to or permission from their parents, Pennhurst placed minor plaintiffs in physical restraints.[68] Although she could walk, Linda Taub was tied into a wheelchair so staff would know where she was.[69] Plaintiff Sorotos was restrained:

> He would be tied to the bench. Often he would be walking around the floor, on all fours pulling the bench with him.
> Q. I don't understand.
> A. Well, he would try to get up and he'd fall over. The bench was tied to his back, so he would just drag it around.

Tr. 12-84 Caranfa.

Seclusion, the practice of putting residents alone in a locked room, is also common at Pennhurst.[70] Generally seclusion rooms at Pennhurst are dark, hard surfaced, unpadded, dangerous, and devoid of furniture; these rooms are filthy. Tr. 1-136 Roos (observing feces on the ceiling and old clothes on exposed pipes).[71] Seclusion at

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65. *Id.* at 69, 71.
66. Tr. 2-87 Clements; 5-128 Girardeau.
67. *Id.*
68. Tr. 13-31 Taylor; 2-152 to 153 Taub.
69. *Id.* Taub.
70. Tr. 1-133 Roos.
71. 446 F.Supp. at 1306 n.34; photos 97, 98 at Ex. G-48; Tr. 1-132 to 133, 134 Roos. Pennhurst staff surveyed every seclusion room and, in a written report to the administration, found dangerous conditions including sharp edges, exposed wiring, hot radiators, matches, and smeared feces. Ex. P-56; Tr. 4-179 to 190, 5-4 to 5. As the employee testified, "an animal shouldn't even be placed in a room like that." *Id.* at 4-190 Lowrie.

Pennhurst is used as punishment for such things as rules infractions[72] and setting fires.[73]

Often a seclusion order is written PRN[74] — "an open door putting the individual in the seclusion room anytime they see fit." Tr. 1-134 Roos. One resident of Pennhurst, Joseph O., was kept in seclusion for five years running; his room was hosed down to clean it.[75]

The use of seclusion is unacceptable under professional standards for caring for the retarded because it promotes no positive behavior and, in fact, is regarded by residents as a reward for inappropriate behavior.[76] Use of restraints and seclusion is "totally unacceptable" for habilitation and "essentially condemn[s] the individual to a lifetime of confinement."[77]

The use of drugs to control behavior is by far the most prevalent form of restraint at Pennhurst. Drug practices at Pennhurst fall far short of minimum professional standards and include excessive use of psychotropic drugs, polypharmacy, and the administration of drugs on a PRN basis.[78]

At Pennhurst, psychotropic drugs, *i.e.*, major tranquilizers,[79] are used for behavior control, in contravention of Food and Drug Administration standards on prescription and dosage.[80] About twice as many residents

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72. A former Pennhurst resident testified that a resident could spend five days or two weeks in seclusion for breaking rules. Tr. 8-27 Hill.

73. Ruddick Dep. at 41; in this situation, the use of seclusion was approved by a "business administrative officer." Later, a physician validated the decision without seeing the resident. *Id.* at 44-45.

74. Abbreviation for *pro re nata*, "as is necessary."

75. Tr. 19-75, 124 to 125 Pirmann.

76. Tr. 5-119 to 120 Girardeau; 1-135 to 136 Roos.

77. Tr. 1-135 to 136 Roos.

78. Tr. 3-36 to 38, 42 to 46, 55 Sprague. "Polypharmacy" is the simultaneous use of many drugs. For "PRN," *see* note 74 *supra*.

79. The dangers, nature and effect of these powerful drugs are described at Tr. 3-15 to 22 Sprague.

80. *Id.* at 3-36 to 44.

are receiving psychotropic medication as would normally be expected to require them.[81]

At Pennhurst, medication is used for the convenience of staff and in lieu of habilitation.[82] Often, the use of these drugs prevents residents from benefitting from those few learning experiences available. For example, for many years plaintiff Larry Taylor could not walk and often fell asleep in school as a result of his medication.[83] Pennhurst's polypharmacy policies make it nearly impossible to determine the efficacy of a particular medication.[84] Training of staff in drug use is insufficient and evaluation of practices is improper.[85] Drugs are administered PRN, often by an aide and without a doctor's order.[86] They are also imposed on minor residents without notice to or consent from parents.[87]

Drugs are not a treatment for mental retardation. Pennhurst Acting Medical Director testified, "I don't think that there are any drugs that will change mental retardation." Tr. 19-190 Hedson.

F. Regression

The results of confinement in the institution called Pennhurst are, sadly, predictable. An individual entering

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81. *Id.*; Tr. 2-89 Clements.

82. Tr. 2-88 to 92; 3-53 Sprague.

83. Tr. 13-24, 28, 62 Taylor. Drugs made plaintiff Sorotos "glassy-eyed" and "groggy" at Pennhurst; he was "fine" at home without any drugs. Tr. 12-86 Caranfa. Plaintiff Bowman developed tremors and shakes from drugging at Pennhurst. Tr. 13-86, 87 to 90 Bowman. *See* 446 F.Supp. at 1308, 1310; 32a-33a, 38a, 39a.

84. Tr. 2-90 to 92 Clements; 3-26, 32, 34, 37, 41, 45, 51 Sprague; Hedson Dep. at 59-61.

85. Ex. G-33; Tr. 3-34, 42-46 Sprague. A testifying expert observed and had photographed a resident being forcibly and dangerously drugged on the floor at Pennhurst. Photo 38 at Ex. G-48; 2-136 to 137 Clements.

86. Boyle Dep. at 38; Tr. 16-79 Boyle; 18-71 Pool.

87. *E.g.*, Tr. 13-24 Taylor; 13-72 Bowman.

Pennhurst can only become more handicapped. The conditions at Pennhurst "are likely to foster regression, maladaptive behavior, and curtailment of mental, personal, social and physical development. Among these conditions I would emphasize enforced idleness, mass living and regimentation, an environment which deviates markedly from the normative." Tr. 1-177 Roos.

As the District Court concluded, "the environment at Pennhurst is not only not conducive to learning new skills, but it is so poor that it contributes to losing skills already learned." 446 F.Supp. at 1308; 34a (citations to record and note omitted). *Accord*, Tr. 1-151 to 152 Roos; 58-59 Clements; 4-73 Lancaster-Gaye; 4-34 to 35 Flueck (study of random sample of records); 7-116 to 118 Hirst; 7-65 to 67 Dybwad.

Plaintiff Terri Lee Halderman was known to be "apt to regress."[88] Yet, from the time she entered Pennhurst, Ms. Halderman received no programs to prevent regression.[89] Residents of Pennhurst who, like Ms. Halderman, enter the institution able to speak, cease to do so because the noise level on the wards is so high that individual conversation is impossible.[90] Not only are residents deprived of the ability to learn new skills in the institution, the conditions therein make inevitable the loss of other acquired skills.[91]

The intellectual and behavioral deterioration inflicted by Pennhurst is a common denominator affecting all residents. Those who, in addition to mental retardation, also suffer physical handicaps, are doubly injured by life at Pennhurst.[92] Those residents fortunate enough to have wheelchairs often do not have chairs which are

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88. Ex. P-66 (Halderman records); Tr. 8-75, 128 to 129 Hirst.

89. *Id.* at 8-80.

90. Tr. 9-88 Halderman, 9-40 Hunsicker; 2-59 Clements; 7-126 Hirst. *See* Tr. 2-170 Taub (plaintiff's functioning "went down.")

91. 446 F.Supp. at 1308; 34a; Tr. 1-96, 100, 151 Roos.

92. 446 F.Supp. at 1305; 26a n.28.

appropriately designed for them.[93] Those who do not have wheelchairs are transported in makeshift wheeled tables known as "cripple carts." And those who lack "cripple carts" are confined to their beds, often on "crib wards." With the absence of physical therapy and the lack of needed equipment, physically handicapped residents develop contractures, the freezing and atrophy of unused muscles, which, in some cases, can only be remedied (if at all) by radical surgery.[94]

G. Potential for Improvement of the Institution

The most telling commentary on the facts of life at Pennhurst is that provided by three retardation experts who, the defendants' counsel told the court, were "clearly retained by us to help us in the defense of this litigation." Tr. 13-148 (Deputy Attorney General Watkins). After a vigorous struggle over the admissibility of their testimony, Tr. 12-3 to 15, the experts summarized their three-month study, embodied in a 350 page report, with a 1,000 page appendix, and a separate paragraph-by-paragraph analysis of the complaint.[95]

The defense team attempted to answer four questions:

> First, what is the role of an institution in the service delivery system. Number 2, is an institution an appropriate educational treatment facility; 3 is Pennhurst an adequate setting; and 4 if not, can Pennhurst be made an adequate facility?

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93. 446 F.Supp. at 1304-1305; 25a-26a; Tr. 20-99 to 101 Fekula.

94. Photo 12 at Ex. G-48; Tr. 2-50 to 51, 55-57 Clements; 4-74, 75 Lancaster-Gaye.

95. Tr. 13-125 to 126 Hersh. The $12,000 contract for the "comprehensive, objective evalaution of Pennhurst," *id.* at 13-117, is PARC Ex. 71. The District Court declined to require the defendants to produce the written report.

Tr. 13-119 Hersh.[96] In response to the first question, they concluded that

> the institution has pretty much lost its role, that it is essentially an obsolete way of treating people. It is based on a series of assumptions which are dated. * * * So that the conclusion we came to is that there is no role for an institutional service delivery system in Pennsylvania.

Id. at 13-128 to 129. An institution was found to be an inappropriate educational treatment facility. Tr. 13-129.

On the third question, Pennhurst was found inadequate:

> We found in many ways that the staff of Pennhurst were really fine people, they were hard-working people, they were doing their best. However, we came to the conclusion that because of the essential obsolescence of the total system and because of the complexity of the interpenetration of the various systems — Southeastern Pennsylvania, child-welfare system, mental retardation system, et cetera, et cetera, that having evaluated all the factors that we could put our hands on we came to the conclusion that Pennhurst is not an adequate facility.

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96. For brevity, the testimony of only one witness, Dr. Alexander Hersh, is presented here. One of the others, Dr. Valaida Walker, former Pennsylvania Department of Public Welfare Regional Mental Retardation Commissioner, cited the team's recommendation that, once its residents were provided individualized services elsewhere, "the name of Pennhurst be abolished completely and never be attached to any part of the facility whatsoever for obvious reasons." Tr. 14-7 to 8. The other team member is expert Dr. Kenneth Thurman.

Tr. 13-130. And it cannot be sufficiently improved:

> We came to the conclusion that it could not, that there is no way that Pennhurst could be made into an adequate facility. It is simply too far beyond repair and there are just literally hundreds of reasons why this is the case, not the least of which is the fact that Pennhurst as the whole structure, the whole way of operating out there is simply too far gone.

Tr. 13-131. The views of defendants' experts were shared by every expert for plaintiffs.

The defendants — state and counties alike — have been unable, despite more than fifteen years of planning and effort, and despite the availability of $21,000,000 earmarked for Pennhurst dispersal, to alter the life imposed on plaintiffs.[97]

H. Community Services

There is a world for the retarded outside Pennhurst. The institution's staff, from social worker to superintendent, agree that all its residents can be better served in small facilities in the community, and the Department of Public Welfare agrees;[98] the state, in fact, had slated Pennhurst to be emptied under a five-year plan.[99]

All persons living at Pennhurst, including the most severely mentally and physically disabled, should receive services and habilitation in the community; people

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97. *See* facts at notes 194-196 *infra*; Tr. 14-10 to 24 (former state retardation Commissioner Walker); 6-165 to 166 Settle. After years of effort, the Willowbrook institution remains unfit for human habitation. Tr. 2-108 Clements.

98. Tr. 8-166 to 167 Hindman; 1-185 Roos; 2-111 Clements; 22-171 to 172 Youngberg; 22-77 Foster; 26-22 Rice; Youngberg Dep. at 102; Foster Dep. at 63.

99. Tr. 28-46, 48 Rice; facts at note 195 *infra*; 446 F.Supp. at 1313; 47a-48a.

with identical disabilities — Pennhurst residents' "twins" — in Pennsylvania are receiving such habilitation *now*.[100]

The graphic contrast between life at Pennhurst and life in the community with needed services was best related at trial by individuals who left the institution.

After spending ten years at Pennhurst, Robert Troester now lives in a Doylestown, Pennsylvania, group home with seven other men. He now has his own room, does his own cooking and helps with the shopping. Each day he takes public transportation to his sheltered workshop, where he is employed as a collator. He enjoys going to movies and restaurants in the Doylestown area. Tr. 8-13 to 19 Troester.

After years at Pennhurst, Robert Hill lives in the community, and works in a delicatessen, "five days, except holidays and Saturday and Sunday." Tr. 8-29 Hill. In his leisure time, Mr. Hill enjoys television, walking or fishing, and mystery novels. *Id.* at 8-27 to 31.

Robert Vaughn spent thirteen years at Pennhurst. He now lives in a group home and is employed as a dishwasher in a local department store. To get to his job he must take three different buses. He is an usher in his church. Tr. 8-39 to 42 Vaughn.

These examples are not aberrations, but rather are typical experiences of Pennhurst residents who return to the community.[101] They also are not attributable to a lack of disability or a lack of behavior problems. Grace Auerbach, the mother of Sidney Auerbach, age 51, who was severely retarded and a resident of Pennhurst for 38 years, described the difference in her son. At Pennhurst,

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100. 446 F.Supp., at 1311; 42a-43a; Tr. 1-183, 185, 190 Roos; 2-84, 111, 125 Clements; 5-161 Girardeau; G-25 to 26, 29 to 31, 35 Glenn; 7-68 to 71 Dybwad; 14-21 Walker; 19-69 to 70 Pirmann; 27-101 Rice.

101. *E.g.*, 10-74, 75, 87 Wood; 10-110 Brown; 10-166 to 167 Bolin; 11-72 to 73, 80 to 81 Kulp.

Mr. Auerbach never spoke. Now, his mother testified, he speaks continuously. He now cooks for himself, holds a job, and keeps his own bank account. Tr. 8-44 to 8-62 Auerbach; 446 F.Supp. at 1311 n. 47; 42a. Residents who engaged in assaultive behavior, temper tantrums and soiling themselves, after six months in a community placement, no longer displayed such activity. Tr. 10-166 to 174 Bolin.

Community living embraces the use of a large spectrum of services, some of which are used as a matter of course by non-retarded persons. A "house-type" residential setting is only "one of many different possibilities" for community care; "We know, of course that there are many other models, including foster placement, family placement, and apartment living, independent living." Tr. 1-207 Roos. In some cases, "a small community-based institution" may be necessary to meet the needs of an individual. *Id.* at 1-208. Other existing residential possibilities include subsidized relatives' homes and supervised apartment clusters.[102] The type of arrangement depends on the needs and abilities of the prospective resident.

In addition to, and reducing the need for, residential placement outside the family home, there exists a continum of services designed to serve the retarded person in the community. These services include early intervention and infant stimulation programs, nursery and pre-school programs, public school programs, pre-vocational and vocational training, and independent employment.[103]

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102. *See, e.g.*, note 4 *supra*; Tr. 2-96 to 97 Clements; 6-18 to 20 Glenn; 5-141 to 161 Girardeau; photos 89, 90, 91, 94, 95 at Ex. G-48.

103. *E.g.*, Photos 57, 58, 89, 93 at Ex. G-48; 5-141, 142, 159, 161 Girardeau; 6-6 to 8, 14 Glenn; 6-95 to 98, 172 to 174 Settle; 10-11 to 32, 45, 60, 65; 11-31 Miller.

With 85% of the retarded capable of gainful employment, Tr. 6-95 Settle, and with vocational services operating in the area surrounding Pennhurst, it is no surprise that the typical response of former residents to the provision of vocational services is tremendous progress, including participation in competitive employment.[104]

It is "considerably less costly to provide for mentally retarded persons in the community than in institutions." Tr. 12-20 Conley (expert retardation economist; based on Pennsylvania costs). In 1977, per-resident annual average cost was $20,000 at Pennhurst and $14,000 in the community. *Id* at 12-22, 23, 35; 446 F.Supp. at 1312; 44a (per diem costs: $64 v. $28). For example, for Montgomery County residents in Pennhurst at a $3.3 million annual cost, it would require $1.9 million to provide habilitation outside that facility. Tr. 12-15. State Commissioner Rice acknowledged at trial that the cost of Pennhurst would more than cover the community care cost for all its residents. Tr. 27-39 to 40.

Existing community services for the retarded in Pennsylvania, including those for former Pennhurst residents, are "excellent," "highly developed," "very good."[105] Funds are available for further development of such services. 446 F.Supp at 1312; 43a-44a; notes 194, 195 and 196 *infra*. Both the state and the county defendants are responsible for the monumental and needless incarceration of human beings under Pennhurst's regime.[106]

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104. Photos 57, 58, 93 at Ex. G-48; 8-16 Troester; 8-29 Hill; 8-40 Vaughn; 10-74 to 75 Wood; 10-106, 110 Brown; 10-166 to 167 Bolin; 11-40 to 43 Miller; 11-72 to 73, 80 to 81 Kulp.

105. Tr. 12-26 Conley; 6-50 Glenn; 5-141 to 161 Girardeau. Other states have community services of considerable quality for severely and profoundly retarded persons. Tr. 28-45 Rice; 1-198 to 199 Ross.

106. On direct county involvement, *see* 446 F.Supp. at 1212-1213; 45a-46a; 612 F.2d at 103; 129a-130a.

The crisis that is Pennhurst and its resolution were correctly characterized by its Superintendent, Dr. C. Duane Youngberg:

> As I said a number of times, it is not mental retardation *per se* that requires the institution. It is just the lack of alternative resources . . . I often say that it is not a matter of our people getting ready to return. It is a matter of the community getting ready to take their people back.

Youngberg Dep. at 102.